

BEYOND RECOGNITION: LESSONS FROM CHILE FOR ALLOCATING INDIGENOUS WATER RIGHTS IN AUSTRALIA

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I INTRODUCTION

Australian water law frameworks, which authorise water use, have historically excluded indigenous people. Indigenous land now exceeds 30 per cent of the total land in Australia.¹ Yet indigenous water use rights are estimated at only 0.01 per cent of total Australian water allocations.² In the limited situations where water law frameworks have engaged with indigenous interests, they typically conceive of such interests as falling outside of the ‘consumptive pool’³ of water applicable to commercial uses associated with activities on land such as irrigation, agriculture, industry or tourism.⁴

The idea that states must ‘recognise’ indigenous groups, and their ongoing rights to land and resources, has become the central claim of the international indigenous rights movement.⁵ Claims for recognition of indigenous land and resource rights are the logical outcome of demands for indigenous rights based on ideas of ‘reparative’ justice.⁶ The colonisers failed to recognise indigenous rights to land and resources at the acquisition of sovereignty, the argument goes, and the remedy is to recognise those rights now. The dominant legal mechanism for recognising indigenous land and resource rights in Australia is native title: a common law doctrine first recognised in the now well-known *Mabo v Queensland [No 2]* (*‘Mabo [No 2]’*).⁷ *Mabo [No 2]* arose in response to the British Crown’s failure to recognise pre-existing indigenous land rights at the acquisition of sovereignty (in reliance on the legal fiction of *terra nullius*, meaning ‘land of no one’). The ‘recognition and protection’ of pre-existing native title

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¹ Jon Altman and Francis Markham, ‘Values Mapping Indigenous Lands: An Exploration of Development Possibilities’ (Paper presented at Shaping the Future: National Native Title Conference, Alice Springs Convention Centre, 3–5 June 2013) 6.

² Sue Jackson and Marcia Langton, ‘Trends in the Recognition of Indigenous Water Needs in Australian Water Reform: The Limitations of “Cultural” Entitlements in Achieving Water Equity’ (2012) 22 *Journal of Water Law* 109, 110.

³ See Council of Australian Governments, ‘Intergovernmental Agreement on a National Water Initiative’ (Intergovernmental Agreement, 25 June 2004) sch B(i) <<http://www.nwc.gov.au>>, which defines the ‘consumptive pool’ as ‘the amount of water resource that can be made available for *consumptive use* in a given water system under the rules of the relevant water plan’ (emphasis in original).

⁴ Ibid sch B(i) (definition of ‘consumptive use’).

⁵ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) 1–2; see Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a “Post-Socialist” Age’ (1995) 212 *New Left Review* 68.

⁶ See Kirsty Gover, ‘Legal Pluralism and State-Indigenous Relations in Western Settler Societies’ (Working Paper, International Council on Human Rights Policy, 2009) 6.

⁷ (1992) 175 CLR 1.

rights to land and waters is now provided for in the *Native Title Act 1993* (Cth) (*'Native Title Act'*).⁸

The need to 'recognise' indigenous rights to land and resources is often argued with reference to theories of 'legal pluralism', on the basis that indigenous rights and law exist independently of state law but should be recognised by the state.⁹ The Australian native title recognition model is sometimes described with reference to such ideas,¹⁰ because the origin of native title rights and interests is in traditional laws and customs existing at the time of sovereignty.¹¹ However, because reparative justifications emphasise a need to recognise rights that were not recognised at the acquisition of sovereignty, pre-sovereignty notions of resource use have tended to restrain the legal rights they entail.¹²

The native title recognition model is the only legal mechanism that deals with indigenous water rights in Australia in any comprehensive way. Australian water law frameworks, in determining rights to access and use water, have relied disproportionately on the conception of indigenous water rights under native title. However, as explored here, native title law has developed in a particularly narrow way through the decisions of the Australian courts and Parliaments. Consequently, rights to water may only be recognised in a native title determination where a claimant group can prove that it holds such rights pursuant to traditional laws acknowledged and traditional customs observed in a substantially uninterrupted manner since pre-sovereignty times. Further, any recognised rights may only be exercised if third parties do not hold water use rights that would be inconsistent with the native title. The result is that native title rights to water have tended to be limited to 'traditional and cultural' water rights that resemble pre-sovereignty water interests. Moreover, these traditional and cultural native title rights to water are extinguished or ineffective where other right holders have, since colonisation, acquired inconsistent rights.

Despite the limitations of the native title model, some Australian commentators remain hopeful that commercial water rights might be recognised as part of a native title determination in the future, as native title jurisprudence 'evolves' to enable the recognition of commercial rights.¹³ In this article, I use a study of Chilean law to argue that it would be preferable to allocate commercial water rights to indigenous

⁸ *Native Title Act* s 3.

⁹ See, eg, Sébastien Grammond, 'The Reception of Indigenous Legal Systems in Canada' in Albert Breton et al (eds), *Multijuralism: Manifestations, Causes, and Consequences* (Ashgate Publishing Limited, 2009) 44. See generally Gover, above n 6.

¹⁰ Noel Pearson, 'The Concept of Native Title at Common Law' [1997] (5) *Australian Humanities Review* <<http://www.australianhumanitiesreview.org/archive/Issue-March-1997/pearson.html>>.

¹¹ *Mabo [No 2]* (1992) 175 CLR 1, 53, 58 (Brennan J).

¹² See also Duncan Ivison, Paul Patton and Will Sanders, 'Introduction' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 1, 10–11 for a discussion of these limitations in the context of traditional cultural conceptions of indigenous rights.

¹³ See, eg, Michael O'Donnell, 'Indigenous Rights in Water in Northern Australia' (Report, Northern Australia Indigenous Land and Sea Management Alliance and Tropical Rivers and Coastal Knowledge, March 2011). See also Samantha Hepburn, 'Native Title Rights in the Territorial Sea and Beyond: Exclusivity and Commerce in the Akiba Decision' (2011) 34(1) *University of New South Wales Law Journal* 159 in the context of commercial fishing rights.

landholders under a statutory framework, outside of (and supplementary to) the native title recognition model. The study is underpinned by in-depth archival research in Chile, and interviews with public servants and lawyers administering the Chilean model.

In Chile, a country with similar climatic challenges for water management and a comparable history of indigenous-settler tension, legal mechanisms were devised to allocate water rights to indigenous landholders, which would, in the Australian context, be considered ‘commercial’. As well as providing for the judicial recognition of ‘*ancestral*’ water rights in northern Chile,¹⁴ in a manner similar to Australian native title, Chile’s Indigenous Land and Water Fund finances the acquisition of water use rights for indigenous landholders, where necessary by purchasing them in the water market.¹⁵ The study of this statutory allocation mechanism reveals important lessons about how we might provide indigenous groups with commercial water rights in Australia.

The article is structured in two parts. In the first part I explore the legal recognition of native title rights to water, and the way in which that recognition is translated into water law frameworks. I then consider the recognition of *ancestral* water rights in Chile, finding them subject to many of the same limitations as native title in Australia, because they focus on water practices originating prior to colonisation that have been continuously maintained. In the final part I consider Chile’s mechanism for allocating new water rights to indigenous landholders, which both respond to and utilise market mechanisms. I consider the potential for a statutory allocation mechanism to provide for commercial indigenous water rights in Australia, pointing to a few discrete examples where legislation or policy has already been used to allocate commercial water rights to indigenous groups. While these examples are limited in their application, they transcend the assumption that indigenous water rights must be limited to traditional and cultural purposes and demonstrate that commercial indigenous water rights could be provided for in Australia outside of the limited native title recognition model.

II EXCLUDING INDIGENOUS PEOPLE FROM WATER LAW FRAMEWORKS

A Australian Water Law and Policy: A History of Indigenous Exclusion

Prior to the acquisition of sovereignty, indigenous groups throughout Australia used land and water without holding any ‘formal title’.¹⁶ It is important to remember that the rights exercised by indigenous groups over land and resources, either prior to or after sovereignty, may be considered ‘property’ regardless of whether they are recognised

¹⁴ *Ley No 19.253 Establece Normas sobre Protección, Fomento y Desarrollo de los Indígenas, y Crea la Corporación Nacional de Desarrollo Indígena 1993* [Law No 19.253 to Establish Norms for the Protection, Creation and Development of the Indigenous, and to Create the National Corporation for Indigenous Development 1993] (Chile) (*‘Indigenous Law’*) art 64.

¹⁵ *Indigenous Law* art 20(c).

¹⁶ By ‘formal title’ I mean a property right recognised or allocated by the state. See Michael Trebilcock and Paul-Erik Veel, ‘Property Rights and Development: The Contingent Case for Formalization’ (2008) 30 *University of Pennsylvania Journal of International Law* 397, 409–11.

by the state.¹⁷ However, they are usually understood as being distinct from the private property (or ‘commodified’) rights to land and resources typically recognised or allocated by western governments.¹⁸

Since the colonisation of Australia, water rights have been allocated with little or no regard for pre-existing indigenous water interests. The British Crown vested in itself the sovereign title to all the land and waters of Australia upon the acquisition of sovereignty,¹⁹ conferring the riparian system of water regulation from the British common law, which allowed landholders to make reasonable use of waters running through or adjacent to their lands.²⁰ However, neither the British Crown nor subsequent Australian governments recognised indigenous-specific rights to land or resources until the late 20th century. Indigenous groups in Australia did not typically hold land title, and did not, consequently, hold riparian water rights as an incident of landholding.

In the late 19th century, Australian states and territories vested their respective Crowns with the right to the ‘use, flow and control’ of surface and ground water,²¹ and implemented a statutory system of water licences and concessions (here called ‘water use rights’) to authorise the ‘consumptive use’²² of water.²³ Otherwise, landholders retained limited rights (often called ‘basic landholder rights’) to use water, including for ‘domestic and stock’ purposes, without the need for a licence or concession, which were the remnant of common law riparian rights.²⁴ The new statutory water use rights were also attached to land, and were intended to support its productive use through activities such as irrigated agriculture.²⁵ However, indigenous groups, who still did not typically hold land titles, did not enjoy access to statutory water use rights as an incident

¹⁷ Lee Godden, ‘Governing Common Resources: Environmental Markets and Property in Water’ in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) 413.

¹⁸ Jonnette Watson Hamilton and Nigel Banks, ‘Different Views of the Cathedral: The Literature on Property Law Theory’ in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) 19, 32–5.

¹⁹ Whether sovereignty was in fact acquired is beyond the scope of this article. See Linda Popic, ‘Sovereignty in Law: The Justiciability of Indigenous Sovereignty in Australia, the United States and Canada’ (2005) 4 *Indigenous Law Journal* 117.

²⁰ Jennifer McKay, ‘The Legal Frameworks of Australian Water: Progression from Common Law Rights to Sustainable Shares’ in Lin Crase (ed), *Water Policy in Australia: The Impact of Change and Uncertainty* (Resources for the Future, 2008) 44, 46.

²¹ The first of these was *The Irrigation Act 1886* (Vic), which in its s 4 vested all water in the Crown and substantially abrogated riparian water rights. The vesting clauses are recorded today in the *Water Management Act 2000* (NSW) s 392; *Water Act 2000* (Qld) s 26; *Water Act 1989* (Vic) s 7; *Rights in Water and Irrigation Act 1914* (WA) s 5A; *Water Resources Act 2007* (ACT) s 7; *Water Act 1992* (NT) s 9.

²² The ‘consumptive use’ of water in Australian water law frameworks is defined as the ‘use of water for private benefit consumptive purposes including irrigation, industry, urban and stock and domestic use’: Council of Australian Governments, ‘National Water Initiative’, above n 3, sch B(i).

²³ See generally B Evans and P Howsam, ‘A Critical Analysis of the Riparian Rights of Water Abstractors within England and Wales’ (2005) 16(3) *Journal of Water Law* 90.

²⁴ See, eg, the limited domestic and stock rights preserved in the *Water Management Act 2000* (NSW) s 52, which do not require a water access entitlement. Similar provisions apply in other Australian jurisdictions *Water Act 1989* (Vic) s 8; *Water Act 2000* (Qld) s 96; *Rights in Water and Irrigation Act 1914* (WA) ss 10, 16, 21.

²⁵ See B R Davidson, *Australia: Wet or Dry? The Physical and Economic Limits to the Expansion of Irrigation* (Melbourne University Press, 1969) 77.

of landholding, and could not, therefore, lawfully make use of water on or adjacent to their traditional territories.²⁶ Meanwhile, non-indigenous landholders continued to accumulate water use rights to support Australia's agricultural expansion.

It was not until the end of the 20th century that Australian governments began to recognise and allocate land titles for indigenous groups. This took the form, firstly, of indigenous land rights legislation in certain Australian states and territories that granted land titles to indigenous groups, beginning with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Then, with the *Mabo [No 2]* decision, the recognition of native title, subsequently regulated in the *Native Title Act*. Importantly, the recognition and allocation of indigenous-specific land rights to indigenous groups coincided with water law reforms implemented in Australian states from the early 1990s,²⁷ whereby water use rights began to be unbundled from land titles, now enshrined in the 2004 Intergovernmental Agreement on a National Water Initiative ('National Water Initiative').²⁸ The water law reforms adopted an 'integrated-market' model of water regulation, premised upon a mixture of centralised water planning and trade in water use rights that were now defined as 'water access entitlements' and could be transferred separately from landholding.²⁹

The unbundling of water use rights was intended to encourage the more efficient, and productive, use of water through increased competition.³⁰ However, the detachment of water use rights from landholding reinforced indigenous exclusion from water law frameworks, for two reasons. First, even if indigenous groups belatedly obtained land rights they would not (as a matter of water law) acquire the right to use water on those lands in the manner they might have had their land rights been recognised or allocated prior to unbundling. If the land rights of indigenous groups had been recognised at the acquisition of sovereignty, for example, they would have acquired riparian water use rights, and could later have converted the riparian rights to state-based water licences and concessions, which also attached to land title. Unbundling also made water use rights available for purchase in water markets, independent of landholding, meaning that third parties could potentially acquire water use rights on or affecting indigenous lands.

²⁶ But see Sue Jackson and Jon Altman, 'Indigenous Rights and Water Policy: Perspectives from Tropical Northern Australia' (2009) 13(1) *Australian Indigenous Law Review* 27, 36. According to Jackson and Altman, in some remote areas of Australia where the state has little involvement in water regulation indigenous groups have continued (despite a lack of state sanctioned water rights) to use water for hunting, fishing and foraging as well as other non-subsistence or market uses.

²⁷ Council of Australian Governments, 'Communique – Attachment A, Water Resource Policy' (25 February 1994) <http://webarchive.nla.gov.au/gov/20041031065143/http://www.coag.gov.au/meetings/250294/attachment_a.htm>.

²⁸ Council of Australian Governments, 'National Water Initiative', above n 3.

²⁹ Ibid [28]–[34]; 'water access entitlements' are defined as 'a perpetual or open-ended share of the *consumptive pool* of a specified water resource, as determined by the relevant *water plan*' (emphasis in original): at [28].

³⁰ D E Fisher, 'Markets, Water Rights and Sustainable Development' (2006) 23 *Environmental and Planning Law Journal* 100, 104–5.

Today, the states primarily determine who may and may not take and use water, and regulate the way in which they do so, under the overall policy approach set by the National Water Initiative.³¹ This is done via water legislation and corresponding water resource plans, which set out the amount of water that can be taken from particular water resources for a range of purposes. The National Water Initiative divides the regulation of water resources between ‘consumptive uses’ (meaning the ‘use of water for private benefit consumptive purposes including irrigation, industry, urban and stock and domestic use’)³² and ‘environmental and other public benefit outcomes’.³³ Those who wish to use water for consumptive purposes must hold a ‘water access entitlement’,³⁴ with a few statutory exceptions where water may be used ‘as of right’ (‘basic landholder rights’), most commonly for ‘domestic or stock’ purposes.³⁵

The National Water Initiative makes it clear that only ‘[w]ater allocated to native title holders for traditional cultural purposes will be accounted for’.³⁶ Accordingly, state-based water legislation and water resource plans usually treat indigenous water interests as being covered by environmental or cultural flows,³⁷ or ‘basic landholder’ rights³⁸ (neither of which was designed with indigenous interests in mind). Such entitlements are not represented by a ‘water access entitlement’ and cannot be used for consumptive purposes.³⁹ Only in the case of New South Wales does water legislation specifically provide for the allocation of water use rights to indigenous groups⁴⁰ and the lack of progress has been criticised by the former National Water Commission.⁴¹

³¹ See also *Water Act 2007* (Cth); *Basin Plan 2012* (Cth). In Australia’s largest water catchment, the Murray Darling Basin, the Commonwealth has implemented specific water legislation and a basin-wide water resource plan providing binding limits on the quantity of water that may be taken from the Basin and binding requirements for water resource plans: *Water Act 2007* (Cth) s 43A; *Basin Plan 2012* (Cth).

³² Council of Australian Governments, ‘National Water Initiative’, above n 3, sch B(i).

³³ Ibid [35].

³⁴ The National Water Initiative requires state water planning frameworks to provide for a ‘water access entitlement, separate from land, to be described as a perpetual or open-ended share of the consumptive pool of a specified water resource, as determined by the relevant water plan’, the allocation of water to the water use right being provided for in a water resource plan: ibid [28]–[34].

³⁵ See above n 24.

³⁶ Council of Australian Governments, ‘National Water Initiative’, above n 3, [54]. Similarly, the Murray Darling Basin’s *Basin Plan 2012* (Cth) provides that indigenous water values and uses are ‘social, spiritual and cultural’: *Basin Plan 2012* (Cth) s 10.52(2).

³⁷ Sue Jackson, ‘Background Paper on Indigenous Participation in Water Planning and Access to Water’ (CSIRO and National Water Commission, February 2009) 5.

³⁸ See generally Poh-Ling Tan, ‘A Review of the Legal Basis for Indigenous Access to Water’ (Report prepared for the National Water Commission, 2009) 15–16. Tan discusses the categorisation of native title rights as ‘basic landholder rights’ under the *Water Management Act 2000* (NSW).

³⁹ See, eg, *Water Sharing Plan for the Coffs Harbour Area Unregulated and Alluvial Water Sources 2009* (NSW) reg 19.

⁴⁰ *Water Management Act 2000* (NSW) ss 56, 57(2); *Water Management (General) Regulation 2011* (NSW) sch 3 cl 4(2).

⁴¹ National Water Commission, ‘A Review of Indigenous Involvement in Water Planning, 2013’ (April 2014) 2

<<http://webarchive.nla.gov.au/gov/20160615062953/http://www.nwc.gov.au/publications/topic/water-planning/indigenous-involvement-in-water-planning>>.

The ‘shoehorning’ of indigenous water interests into ‘environmental and public benefit’ outcomes or ‘domestic and stock’ rights differentiates them from substantive water use rights that take from the ‘consumptive pool’. This differentiation is unlikely to be accidental, as it minimises conflict between indigenous and other interests. Yet, by failing to provide indigenous Australians with a share of the consumptive pool, Australian water law and policy does not adequately address water rights distribution. Other right holders continue to hold almost all water use rights, and indigenous groups hold very few.

B Indigenous Exclusion from Water Law Frameworks in Chile

As was the case in Australia, indigenous groups in Chile⁴² were excluded from laws that authorised water use as an incident of landholding from the Spanish acquisition of sovereignty⁴³ until the late 20th century, because indigenous groups did not typically have recognised or granted land titles during that period.⁴⁴ Since 1855 water resources in Chile have been publically vested as ‘*bienes nacionales de uso público*’ (national goods for public use), in a similar manner as occurred in Australian states.⁴⁵ This enabled governments to allocate water rights with little or no regard for the pre-existing water use of indigenous communities.

Also like Australia, Chile began to respond to indigenous claims for land and resource rights from the late 20th century, with its *Indigenous Law*, passed the same year as the *Native Title Act*. However, because water use rights had been unbundled from land titles ten years earlier in water reforms that adopted a similar ‘integrated-market’ logic,⁴⁶ indigenous landholders who acquired land titles under the *Indigenous Law* would not automatically enjoy the right to use water on their lands as a matter of water law.

In the early 1980s Chilean water law frameworks underwent substantial reform, with the introduction of an ‘integrated-market’ approach to water regulation and a new *Water Code 1981*.⁴⁷ Chilean water law reform was part of a wider project of neoliberal reform implemented by the military dictatorship across a range of sectors, and was accompanied by rapid growth in water-related development such as mining and

⁴² The indigenous population of Chile is approximately 11 per cent of the total population: Instituto Nacional de Estadísticas Chile, ‘Censo 2012: Resultados XVIII Censo de Población’ [Census 2012: Results of the 18th Population Census] (Report, 30 June 2012) 172.

⁴³ See generally Robert J Miller, Lisa LeSage and Sebastián López Escarcena, ‘The International Law of Discovery, Indigenous Peoples, and Chile’ (2011) 89 *Nebraska Law Review* 819, 850–3.

⁴⁴ René Kuppe, ‘The Three Dimensions of the Rights of Indigenous Peoples’ (2009) 11 *International Community Law Review* 103, 108.

⁴⁵ *Código Civil 1855* [Civil Code 1855] (Chile) art 595; *Código de Aguas 1951* [Water Code 1951] (Chile) art 12. Now reflected in the *Código de Aguas 1981* [Water Code 1981] (Chile) art 5 (‘*Water Code*’).

⁴⁶ *Decreto Ley 2.603 Modifica y Complementa Acta Constitucional N° 3; y Establece Normas sobre Derechos de Aprovechamiento de Aguas y Facultades para el Establecimiento del Régimen General de las Aguas 1979* [Decree Law 2.603 to Modify and Complement Constitutional Act 3; and to Establish Rules about Water Rights and Arrangements for the Establishment of a General Water Regime 1979] (Chile) (‘*Decree Law 2.603 1979 (Chile)*’) art 3.

⁴⁷ *Water Code; Decree Law 2.603 1979 (Chile)*.

hydroelectricity.⁴⁸ The new approach combined centralised water regulation with trade in unbundled *derechos de aprovechamiento* in water markets.

The unbundling of water use rights (called '*derechos de aprovechamiento*') from land titles in Chile also intensified indigenous exclusion from water law frameworks. Since the reform few indigenous groups have acquired *derechos de aprovechamiento* via the processes set out in the *Water Code* because indigenous communities had limited knowledge of the mechanisms and limited finance for legal and administrative processes,⁴⁹ and due to widespread indigenous dispossession and urbanisation.⁵⁰ The *Water Code* allows three ways in which a person can acquire a *derecho de aprovechamiento*: via the constitution of a new right as an administrative act pursuant to article 20;⁵¹ via the judicial 'regularisation' of unregistered ('customary') water use under transitory article 2;⁵² or by private bargaining in water markets.⁵³

The regularisation process has been commonly used by small-scale agricultural water users (indigenous or otherwise) to obtain recognition of historical, 'customary' water use. However, it was not possible for indigenous Chileans to regularise communal water use rights prior to the *Indigenous Law* as they did not enjoy legal personality separate to their individual members.⁵⁴ Some indigenous groups in the region of Antofagasta acquired *derechos de aprovechamiento* as water associations using the general regularisation provisions of the *Water Code* prior to 1993.⁵⁵ However, members of

⁴⁸ See generally Carl J Bauer, *Siren Song: Chilean Water Law as a Model for International Reform* (Resources for the Future, 2004) 4; Arne Ruckert, 'Towards an Inclusive-Neoliberal Regime of Development: From the Washington to the Post-Washington Consensus' (2006) 39(1) *Labour, Capital and Society* 34, 42–3.

⁴⁹ See Jessica Budds, 'The 1981 Water Code: The Impacts of Private Tradeable Water Rights on Peasant and Indigenous Communities in Northern Chile' in William L Alexander (ed), *Lost in the Long Transition: Struggles for Social Justice in Neoliberal Chile* (Lexington Books, 2009) 41, 54; Interview with Daniela Rivera (Santiago, 22 November 2011); Comisión Especial Pueblos Indígenas, 'Primer Informe Comisión Especial Pueblos Indígenas' [First Report of the Special Commission for Indigenous Peoples] (10 November 1992), in Biblioteca del Congreso Nacional de Chile (ed), 'Historia de la Ley No 19.253: Establece Normas sobre Protección, Fomento y Desarrollo de los Indígenas y Crea la Corporación Nacional de Desarrollo Indígena' [History of Law No 19.253 to Establish Norms for the Protection, Creation and Development of the Indigenous, and to Create the National Corporation of Indigenous Development] (Biblioteca del Congreso Nacional de Chile, 5 October 1993) 43, 64; Bauer, above n 488, 94–5; Interview with Manuel Prieto (Santiago, 4 September 2013).

⁵⁰ See D Solís and A Luis, 'Memoria: Comisión Especial de Pueblos Indígenas' [Memoir: Special Commission for Indigenous Peoples] (Report, Comisión Especial de Pueblos Indígenas, 1993) 19–20, 30–39 for a discussion of the impacts of indigenous urbanisation.

⁵¹ Alejandro Vergara Blanco, *Derecho de Aguas* [Water Law] (Editorial Jurídica de Chile, 1998) vol 2, 322–6.

⁵² See generally *ibid* 327.

⁵³ See *ibid* 315.

⁵⁴ Solís and Luis, above n 50, 32. *Water Code* art 5, which provides that '*particulares*' [individuals] can hold *derechos de aprovechamiento*. Carolina de Lourdes Riquelme Salazar, *El Derecho al Uso Privativo de las Aguas en España y Chile: Un Estudio de Derecho Comparado* [Exclusive Water Rights in Spain and Chile: A Comparative Law Study] (PhD Thesis, Universitat Rovira I Virgili, 2013) 240, explains that the concept of '*particulares*' encompasses natural and legal persons acting in the private realm.

⁵⁵ See, eg, Conservador de Bienes Raíces y Comercio de Tocopilla [Real Estate and Business Registry of Tocopilla], *No 13 Comunidad de Aguas 'Canal dos de Quillagua'* [No 13 Water

water associations exercised water rights in an individual manner,⁵⁶ and any one individual could alienate their ‘shares’ in a water association without the consent of the other members.⁵⁷ Consequently, many indigenous communities were wary of the mechanism.⁵⁸

Once *derechos de aprovechamiento* were available for purchase separate from landholding in water markets, other right holders began to acquire rights to use water resources on or affecting indigenous owned or occupied lands.⁵⁹ Encroachment by other right holders was aided by Chile’s rapid growth in water-related development such as mining and hydroelectricity during the military dictatorship, and increased competition for water in water markets.⁶⁰ Where other right holders sought water use rights via the mechanisms of constitution or regularisation, the relevant administrative and judicial bodies did not account for water use by indigenous groups, which was not recorded.⁶¹ The processes for public notification and objection of new applications for *derechos de aprovechamiento* under the *Water Code* were little help, as few indigenous groups had access to the Official Gazette, radio or even local newspapers.⁶²

By the end of the 1980s, it was uncommon for indigenous groups in Chile to hold *derechos de aprovechamiento* and other right holders held almost all of the water use rights in Chile.⁶³ This unfair distribution, leaving many indigenous groups with indigenous-specific land rights but no right to use the water on the land, was a similar predicament to that facing indigenous-specific landholders in Australia today.

III NATIVE TITLE AND WATER RIGHTS RECOGNITION IN AUSTRALIA

It is clear that rights to water may be recognised in Australia’s native title process,⁶⁴ in either of two ways.⁶⁵ One of these ways is section 211 of the *Native Title Act*, which

Community ‘Second Canal of Quillagua’], Regularisation decision 619/155, 10 December 1986. See Interview with Manuel Prieto (Santiago, 4 September 2013); *Water Code* arts 187–282. The various water associations are ‘*comunidades de aguas*’, ‘*asociaciones de canalistas*’ and ‘*juntas de vigilancia*’.

⁵⁶ *Water Code* art 193.

⁵⁷ Comisión Especial Pueblos Indígenas, above n 49, 64.

⁵⁸ See Manuel Prieto, *Privatizing Water and Articulating Indigeneity: The Chilean Water Reforms and the Atacameño People (Likan Antai)* (PhD Thesis, University of Arizona, 2014) 201–4.

⁵⁹ The *Water Code* did in arts 131–3 provide for public notification and objection processes where other right holders sought to create or regularise water use rights.

⁶⁰ See generally Budds, ‘The 1981 Water Code’, above n 49, for a discussion of the impacts of water markets and economic expansion indigenous and peasant water rights during this period.

⁶¹ It was only after 1992 that the General Water Directorate began to keep track of water rights that were ‘regularisable’: see Vergara Blanco, above n 51, 348.

⁶² *Water Code* arts 131–3.

⁶³ Comisión Especial Pueblos Indígenas, above n 49, 64–5.

⁶⁴ *Mabo [No 2]* (1992) 175 CLR 1, 58 (Brennan J); *Native Title Act* s 223(1).

⁶⁵ Where native title holders have obtained a determination of native title rights to land to the exclusion of all others, they have also been recognised as holding an accompanying right to make decisions about access to and use of land and waters, although only to the extent that this is not inconsistent with the rights and interests of others granted under legislation (including the water use rights held by other users) which take priority over native title rights. In any event, such rights are procedural rather than substantive in nature and do not provide any positive

allows native titleholders limited rights to access water in exercise or enjoyment of their native title rights and interests without a water license or permit. However, section 211 expressly excludes the use of water for commercial purposes. The other way is as part of a determination of native title rights and interests by a court under section 225 of the Act.

Both the *Native Title Act* and its interpretation by the courts have led to a number of limitations being placed on native title rights to water. ‘Native title rights and interests’ have been characterised as a ‘bundle of rights’, ranging from a right of exclusive possession to limited use rights.⁶⁶ However, rights to ‘own’⁶⁷ water cannot be one of the ‘sticks in the bundle’⁶⁸ because section 223(1)(c) of the *Native Title Act* provides that native title rights and interests must be ‘recognised by the common law of Australia’,⁶⁹ and the common law does not allow ownership of water in its natural state.⁷⁰ Further, the courts have held that native title rights to water cannot be exclusive, as exclusive rights would be inconsistent with the legislative vesting of the right to the control and use of water in the Crown.⁷¹

Admittedly, the impossibility for native title rights to water to be rights of ‘ownership’ does not (in and of itself) limit the potential for native title rights to water to be recognised or exercised for commercial purposes. The Australian courts have not been prepared to characterise any water use rights as rights of ownership, although the water use rights held by other right holders are often allocated and exercisable for commercial purposes. Nevertheless, there are two problems with the native title recognition model for water rights, which undermine the potential to establish and exercise native title rights to water for commercial purposes. The first is a threshold requirement for native

entitlement to access and use water. See, eg, *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 504–7 (The Court).

⁶⁶ *Western Australia v Ward* (2002) 213 CLR 1, 95 [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Yanner v Eaton* (1999) 201 CLR 351, 365–71 [17]–[31] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁶⁷ In *Yanner v Eaton* (1999) 201 CLR 351, 368 [25] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), “[o]wnership” connotes a legal right to have and to dispose of possession and enjoyment of the subject matter’.

⁶⁸ The inability of native title to recognise ownership rights in water is sometimes made explicit in native title determinations. See, eg, *Kaurareg People v Queensland* [2001] FCA 657 QG 6024, O 8 (Drummond J): ‘Notwithstanding anything in this determination, the Native Title Rights and Interests do not confer on Native Title Holders rights of ownership in respect of flowing water’.

⁶⁹ See *Commonwealth v Yarmirr* (2001) 208 CLR 1, 49 [42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), explaining that ‘recognise’ in this context means that the common law ‘will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them’.

⁷⁰ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 173–4 [55]–[57] (French CJ, Gummow and Crennan JJ).

⁷¹ *Western Australia v Ward* (2002) 213 CLR 1, 152 [263] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Native title determinations usually confirm that native title rights to water are non-exclusive. See, eg, *Brooks on behalf of the Mamu People v Queensland [No 4]* [2013] FCA 1453 QUD 6014, O 8 (Dowsett J):

Subject to paragraphs 10, 11 and 12 below the nature and extent of the native title rights and interests in relation to the land and waters described in Part 1 of Schedule 1 are: ...

b) in relation to Water, the non-exclusive rights to: ...

(iii) take and use the Water of the area, for personal, domestic and non-commercial communal purposes.

title rights to be evidenced by traditional laws and customs (a ‘problem of continuity’). The second (a ‘problem of priority’) is produced by provisions of the *Native Title Act* dealing with the grant of inconsistent rights in water to third parties, which renders native title water rights that can be recognised ineffective.

A The Problem of Continuity

When the Court in *Mabo [No 2]* recognised the continuance of native title over land and water, it also introduced the idea that native title rights will only be recognised where a group has continued to acknowledge their traditional laws or observe their traditional customs providing for land and water rights since pre-sovereignty times.⁷² This idea of ‘continuity’ is reflected in section 223 of the *Native Title Act*, which requires that native title rights and interests in land or waters be (now) ‘possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders’.⁷³ Further, it requires that ‘the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters’. The application of section 223 in the Australian jurisprudence has produced two concerns with respect to continuity.⁷⁴ The first is whether traditional laws and customs must be continuously acknowledged or observed since pre-sovereignty times. The second is whether the laws and customs can adapt or change since pre-sovereignty times and still be considered to be ‘traditional’.

The High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria* (‘*Yorta Yorta*’)⁷⁵ confirmed that section 223 requires a native title applicant to particularise the traditional laws and customs establishing their native title right. Those laws and customs must have been ‘acknowledged and observed by the ancestors of the claimants at the time of sovereignty’.⁷⁶ Further, the acknowledgement and observance of those laws and customs must have continued ‘substantially uninterrupted since sovereignty’, being passed down ‘from generation to generation’.⁷⁷

Even in the case of land, it is very difficult for indigenous groups to prove the content of pre-sovereignty traditional laws and customs establishing their rights some 200 years later.⁷⁸ Proving that those traditional laws and customs have been acknowledged and observed, in a substantially uninterrupted manner, since the acquisition of sovereignty is also difficult. Because rights to use water were an incident of landholding until the end of the 20th century, indigenous people may have been unable to continue to acknowledge traditional laws or observe traditional customs authorising water use

⁷² *Mabo [No 2]* (1992) 175 CLR 1, 59–60 (Brennan J). See generally Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008).

⁷³ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444–5 [47] (Gleeson CJ, Gummow and Hayne JJ).

⁷⁴ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) 19.

⁷⁵ (2002) 214 CLR 422.

⁷⁶ Ibid 456 [87] (Gleeson CJ, Gummow and Hayne JJ).

⁷⁷ Ibid.

⁷⁸ Anne Hewitt, ‘Commercial Exploitation of Native Title Rights – A Possible Tool in the Quest for Substantive Equality for Indigenous Australians?’ (2011) 32 *Adelaide Law Review* 227, 251–6.

where their access was prevented by the rights of adjacent landholders.⁷⁹ The High Court has stressed that a physical connection is not necessarily required in order to satisfy the requirement in section 223(1)(b) that the native titleholders, by their pre-sovereignty laws and customs, ‘have a connection with the land or waters’.⁸⁰ Yet, it would certainly be harder to prove connection to particular waters, pursuant to traditional laws and customs authorising water use at the acquisition of sovereignty, where water resources are no longer used by the claimant.

The requirement that laws and customs establishing indigenous water interests be passed down generation to generation in a substantially uninterrupted manner presents particular challenges for claims for commercial water rights. The use of water for commercial purposes may be quite different from the use of water by indigenous groups in pre-sovereignty times, raising a question of whether the use of water for commercial purposes derives from pre-sovereignty traditional laws and customs.⁸¹

B The Problem of Priority

Even if native title rights to water can be established for commercial purposes, the *Native Title Act* provides for their extinguishment or ineffectiveness to the extent of any inconsistency with rights granted to other users.⁸²

In 1975 the *Racial Discrimination Act 1975* (Cth) commenced, guaranteeing to indigenous Australians ‘immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community’, and entitling them to consultation or compensation for the extinguishment of native title rights and interests after 1975.⁸³ As a consequence of the recognition of native title rights and interests by the Australian courts in *Mabo [No 2]*, the grant of inconsistent rights to others after 1975 could be rendered invalid because of its discriminatory impact on native title. However, many water users legally acquired water use rights prior to 1975, meaning that native title rights to water will have been extinguished, without the need for consultation or compensation.⁸⁴

In response to public concern around the uncertainty produced by the recognition of native title in *Mabo [No 2]* on other right holders, the *Native Title Act* established a complicated regime to determine the impact of the grant of inconsistent rights (called

⁷⁹ See Jackson and Langton, above n 2, 112 discussing the challenges for retaining customary connections and attaining recognition posed by this ‘chronological possession of land and water rights’.

⁸⁰ *De Rose v South Australia [No 2]* (2005) 145 FCR 290, 306 [62] (The Court).

⁸¹ *Yorta Yorta* (2002) 214 CLR 422, 455 [83] (Gleeson CJ, Gummow and Hayne JJ).

⁸² See *Akiba v Commonwealth* (2013) 250 CLR 209, 237 [52] (Hayne, Kiefel and Bell JJ) (emphasis in original): ‘inconsistency of rights lies at the heart of any question of extinguishment’; *Western Australia v Ward* (2002) 213 CLR 1, 136 [215] (Gleeson CJ, Gaudron, Gummow, and Hayne JJ).

⁸³ *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 218–19 (Brennan, Toohey and Gaudron JJ). See generally Maureen Tehan, ‘A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*’ (2003) 27 *Melbourne University Law Review* 523.

⁸⁴ See *Western Australia v Ward* (2002) 213 CLR 1, 152 [263]–[265] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

‘acts’) on native title.⁸⁵ Generally, the grant of inconsistent water rights to third parties extinguishes native title or confirms that the third party grants are valid despite their impact on native title, with compensation sometimes payable.⁸⁶

The *Native Title Act* includes specific provisions that validate third party water interests granted since 1993 and into the future,⁸⁷ which were inserted into the future acts regime in 1998 in response to concerns about the certainty of third party rights and interests after the decision in *Wik Peoples v Queensland*.⁸⁸ Although native title rights which are inconsistent with such future acts are not extinguished, the native title is ‘prevailed over’⁸⁹ by the inconsistent water use rights, leaving only a right to compensation.⁹⁰ In the case of ‘fully allocated’ water resources, including in Australia’s largest water catchment, the Murray Darling Basin, commercial native title rights to water would probably be overridden by the inconsistent water legislation and water use rights under it.⁹¹

The cumulative effect of the continuity and priority problems on native title rights to water is that the native title process formalises water interests based on traditional laws and customs that have continued to be acknowledged and observed by indigenous groups and where rights to use the resource have not been allocated to third parties. As noted by Williams, this outcome is ‘perverse’, because it requires native title applicants to pretend that they have not been historically excluded from land and resource rights in order to obtain recognition.⁹² It requires them to prove that they have continued to enjoy relationships with water resources of which they have been dispossessed.

C The Evolution of Native Title?

In not one of the approximately 350 determinations of native title since *Mabo [No 2]* has an Australian court or tribunal expressly recognised a right to use water for commercial purposes.⁹³ Determinations typically restrict any native title rights to water

⁸⁵ *Native Title Act* ss 24JA, 24KA, 24HA(4),(5), 238, 24HA(7). See generally Gardner, Bartlett and Gray, below n 257.

⁸⁶ See Michael O’Donnell, ‘Briefing Paper for the Water Rights Project by the Lingiari Foundation and ATSIC’ in *Background Briefing Papers* (Lingiari Foundation, February 2002) 95, 104 <http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIC/issues/Indigenous_Rights/Indigenous_Rights_Waters/docs/layout_papers.pdf>.

⁸⁷ *Native Title Act* ss 24HA, 44H.

⁸⁸ (1996) 187 CLR 1. See generally Garth Nettheim, ‘The Search for Certainty and the *Native Title Amendment Act 1998* (Cth)’ (1999) 22 *University of New South Wales Law Journal* 564, 571–2; Tehan, above n 83, 552–6.

⁸⁹ *Native Title Act* s 24AA(7).

⁹⁰ *Native Title Act* s 24HA(5).

⁹¹ Australian water law frameworks make a distinction between water resources that are fully allocated (where with full development of water access entitlements in relation to a particular water resource, the total volume of water able to be extracted by entitlement holders at a given time reaches the environmentally sustainable level of extraction for that system) and under allocated water resources. See Council of Australian Governments, ‘National Water Initiative’, above n 3, sch B(i) (definition of ‘overallocation’).

⁹² Joe Williams, ‘Confessions of a Native Judge: Reflections on the Role of Transitional Justice in the Transformation of Indigeneity’ (Issue Paper No 14, Australian Institute of Aboriginal and Torres Strait Islander Studies, June 2008) 8–9.

⁹³ National Native Title Tribunal, *National Native Title Register* <<http://www.nntt.gov.au>> (I reviewed all native title determinations listed in the register up until the end of 2015).

to ‘personal, domestic and non-commercial communal purposes’.⁹⁴ Some commentators predict that indigenous groups may be recognised as having a right to use various resources for any (including commercial) purposes as part of evolving native title jurisprudence concerning a ‘right to trade’,⁹⁵ following the High Court of Australia’s 2013 decision in *Akiba v Commonwealth* (‘*Akiba*’).⁹⁶ The Court in *Akiba* held that native title rights to take fish in offshore waters for any purposes were not extinguished by Queensland fisheries legislation prohibiting the taking of fish for commercial purposes without a licence.⁹⁷ *Akiba* was followed in two 2014 Federal Court decisions by North J, which emphasised that establishing a right to take resources for trade required establishing that the claim group has a right under traditional laws and customs to access and take resources for any purpose in the application area.⁹⁸ These cases confirm that it is not necessary to prove that activity in conformity with traditional laws and customs has taken place in order to establish that a right exists, although proof of activities undertaken pursuant to laws and customs will assist in proving the existence of the right.⁹⁹ Rather, the group has to prove the existence of traditional laws and customs that would give them such a right, even if there were no evidence provided of actual trading activity.¹⁰⁰

While *Akiba* and the decisions of North J are welcome developments for Australian native title jurisprudence, none of the decisions directly concerned rights to water, nor do they secure the future recognition of commercial native title rights,¹⁰¹ for two reasons.

First, because of the problem of continuity, an applicant seeking commercial water rights via the native title recognition model still needs to establish a right to take and use water, for any purpose, under traditional (meaning pre-sovereignty) laws and customs. This is a question of fact, which must be proved.¹⁰² Yet, many indigenous groups have ceased to acknowledge and observe traditional laws and customs providing

⁹⁴ See, eg, *Lampton on behalf of the Juru People v Queensland* [2014] FCA 736 QUD 554, O 7 (Rares J). In contrast, the Canadian aboriginal title jurisprudence allows for native title to be held generally for non-traditional purposes. See *Tsilhqot’in Nation v British Columbia* [2014] 2 SCR 257, 291–2 [67] (Vickers J).

⁹⁵ See, eg, O’Donnell, ‘Indigenous Rights’, above n 13. Note that most of the determinations recognising a ‘right to trade’, or a right to take resources for any purpose were negotiated agreements between the parties as consent determinations rather than litigated determinations. The Federal Court in *BP (deceased) v Western Australia* [2014] FCA 715 casts doubt on the precedent value of previous native title determinations reached by consent, stating, ‘[t]hose determinations reflect the outcome of negotiations which doubtless involved compromises on all sides and responded to the interests rather than the rights of the parties’: at [98] (North J).

⁹⁶ (2013) 250 CLR 209. The interpretation of the *Akiba* decision is not aided by its brevity. See Lauren Butterly, ‘Unfinished Business in the Straits: *Akiba v Commonwealth of Australia* [2013] HCA 33’ (2013) 8(8) *Indigenous Law Bulletin* 3, 5.

⁹⁷ *Akiba* (2013) 250 CLR 209, 241 [65] (Hayne, Kiefel and Bell JJ).

⁹⁸ *BP (deceased) v Western Australia* [2014] FCA 715 (‘*BP*’); *Willis v Western Australia* [2014] FCA 714 (‘*Willis*’).

⁹⁹ *BP* [2014] FCA 715, [89]; *Willis* [2014] FCA 714, [118].

¹⁰⁰ *BP* [2014] FCA 715, [89]–[90]; *Willis* [2014] FCA 714, [119].

¹⁰¹ See also Butterly, above n 96, 5 arguing that the significance of the *Akiba* decision even in terms of commercial fishing rights remains unclear, pointing out that the judgment does not require the relevant states to allocate (or reallocate) any commercial fishing rights to native title claimants, and subjecting any native title rights to fish to the future acts regime.

¹⁰² *Mabo [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

for water use since pre-sovereignty times, including where they have been prevented from continuing to exercise their rights to use water by the allocation of inconsistent land title and water use rights to third parties.¹⁰³

Akiba, and the following decisions, stand for the proposition that evidence of pre-sovereignty commercial activities is not necessary to establish a right to take and use resources for any purposes.¹⁰⁴ However, the Court acknowledges that evidence of such activities ‘focuses attention on the right’¹⁰⁵ and helps to establish the existence of the right.¹⁰⁶ In these cases, substantial anthropological and historical evidence was led in support of a native title right to access and take resources for any purposes. However, the extent to which that evidence concerned ‘commercial’ purposes was more limited than I use here, relating to exchange and sale of the resources themselves.¹⁰⁷ For example, in one case, anthropological and historical evidence was led about traditional rights to ‘trade in ochre, shell, grindstones, ground stone axes, stone knives, wooden implements and tobacco’.¹⁰⁸ There have been no native title cases in which evidence has been led about a native title right, arising from pre-sovereignty traditional laws and customs, to take and use water for commercial purposes like irrigation or industry.

Secondly, even if a native title right to take and use water for any purposes can be made out, it would be non-exercisable where inconsistent with water legislation and the grant of water use rights to other users under the future acts regime of the *Native Title Act*.¹⁰⁹ While the use of water for traditional and cultural purposes may not be inconsistent with the water use rights held by third parties, the consumptive use of water for commercial activities on indigenous-specific lands such as irrigation, agriculture, industry or tourism would likely be inconsistent with water use rights held by others. Given the scarce and highly contested nature of water resources in Australia, native title rights to water for commercial purposes would, in many areas, conflict with other water use rights and therefore be extinguished or non-exercisable.

The Court in *Akiba* also made it clear that while a native title right to take and use resources for any purpose may be recognised, it will still be subject to regulation by the state.¹¹⁰ This means that native titleholders cannot use their rights for commercial purposes without the necessary licences or permits under state water law frameworks. The limited statutory rights native titleholders hold to use water in enjoyment of their native title rights and interests without the need for a water use right expressly exclude the use of water for commercial purposes.

¹⁰³ See *Yanner v Eaton* (1999) 201 CLR 351, 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ): ‘[r]egulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (*whether or not prohibiting the exercise of that relationship altogether might, or might to some extent*)’ (emphasis added).

¹⁰⁴ See, eg, *BP* [2014] FCA 715, [90].

¹⁰⁵ *Akiba* (2013) 250 CLR 209, 242 [68] (Hayne, Kiefel and Bell JJ).

¹⁰⁶ *BP* [2014] FCA 715, [89]; *Willis* [2014] FCA 714, [118]. See generally Australian Law Reform Commission, above n 74, 243 about the crucial role of evidence in native title determinations.

¹⁰⁷ See, eg, *Willis* [2014] FCA 714, [116], [120], [123] (North J).

¹⁰⁸ *BP* [2014] FCA 715, [59] (North J).

¹⁰⁹ See *Akiba* (2013) 250 CLR 209, 237 [52] (Hayne, Kiefel and Bell JJ).

¹¹⁰ *Akiba* (2013) 250 CLR 209, 240–1 [63]–[64] (Hayne, Kiefel and Bell JJ).

IV RECOGNISING ANCESTRAL WATER RIGHTS IN CHILE

Article 64 of the *Indigenous Law* has been used by the Chilean courts to recognise the *ancestral* water rights of ‘indigenous communities’¹¹¹ in northern Chile in a way similar to native title rights to water in Australia.¹¹² Article 64 provides:

The waters of the Aimara and Atacameña communities must be especially protected. Waters, including rivers, canals, streams and springs, found on the lands of the Indigenous communities established by this law will be considered property of ownership and use of the Indigenous communities, without prejudice to the rights that other right holders have registered in accordance with the Water Code.

New water rights must not be granted over lakes, ponds, springs, rivers and other aquifers that supply waters owned by the various Indigenous communities established by this law without first guaranteeing normal water supply to the affected communities.

Despite the fact that the word ‘recognise’ is not used in article 64, the Chilean courts have treated article 64 as a recognition mechanism much like the Australian native title model.¹¹³ A key difference is that *ancestral* water rights under article 64 are much stronger than rights to water as recognised in Australian native title law, which cannot amount to rights of ownership, and do not convey the right to exclude. Conversely, article 64 establishes ‘a presumption of ownership and use’,¹¹⁴ recognising a right of ‘*propiedad*’, which at Chilean civil law entails a ‘*derecho real*’ (similar to the Latin *in rem*)¹¹⁵ in a physical thing, to enjoy and dispose of it arbitrarily, provided it is not against the law or the rights of others.¹¹⁶ The right of *propiedad* in water is protected by article 19(24) of the *Constitution 1980* (Chile).¹¹⁷ Significantly, the Chilean Courts have

¹¹¹ Indigenous communities are constituted in accordance with arts 9 and 10 of the *Indigenous Law*. According to the National Indigenous Development Corporation’s website, as at 26 May 2017 there were 3213 registered communities with 125 033 members and 1843 registered associations with 69 660 members listed in the Register of Indigenous Communities and Associations: Corporación Nacional de Desarrollo Indígena, *Registro de Comunidades y Asociaciones Indígenas* [Register of Indigenous Communities and Associations] <<http://www.conadi.gob.cl/index.php/registro-de-comunidades-y-asociaciones-indigenas>>.

¹¹² Article 64 refers only to the water rights of the Aymara and Atacameña indigenous communities. However, a number of indigenous communities have relied on international law to recognise their water rights despite not belonging to those ethnicities: Interview with Juan Carlos Araya (Santiago, 15 November 2011); David Espinoza Quezada, ‘Regularizaciones Remitidas por DGA Región de Antofagasta a Tribunales Competentes’ [Regularisations Remitted by the DGA in the Region of Antofagasta to Competent Courts] (Water Rights Database, Dirección General de Aguas [General Water Directorate], last updated January 2012) (copy on file with author).

¹¹³ *Alejandro Papic Domínguez con Comunidad Indígena Aymara Chusmiza y Usmagama* (‘*Chusmiza*’), Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [8].

¹¹⁴ *Ibid* [7].

¹¹⁵ See generally Samantha Hepburn, *Principles of Property Law* (Cavendish Publishing, 1998) 2, ‘[t]he definitive right in private property relationships is the right of the owner to the use, possession and enjoyment of the object to the exclusion of the rest of the world. Legally, this right is known as an “*in rem*” right because it is enforceable against the rest of the world’. *Civil Code 1855* (Chile) art 582.

¹¹⁷ *Constitución Política de la República de Chile 1980* [Political Constitution of the Republic of Chile 1980] (Chile) (‘*Constitution 1980* (Chile)’).

not found the public vesting of water to be an obstacle to allocating private rights of *propiedad* in water,¹¹⁸ by understanding that *propiedad* attaches to the right to use the water and not to the water itself.¹¹⁹

As in Australia, the courts are responsible for determining when, and on what terms, indigenous landholders will have their water rights recognised under article 64. In fact, water rights provided for in article 64 do not need a registered title (a *derecho de aprovechamiento*) in order to be protected.¹²⁰ An indigenous community could, for example, rely on article 64 to enforce its water rights against prejudicial state action using administrative law writs such as the *recurso de protección* (action for protection of constitutional rights).¹²¹ However, by convention, *ancestral* water rights recognised in article 64 have been provided for in the judicial process of ‘regularisation’ under transitory article 2 of the *Water Code*, discussed above.¹²²

It is important to note that the regularisation process predates the *Indigenous Law*, and was designed with informal water use by agricultural, rather than indigenous, water users in mind. The process was devised to formalise the vast numbers of registered and unregistered water rights existing under different laws at the time of passing the *Water Code*,¹²³ considered necessary in order for water markets to emerge. Regularisation adopted the logic of ‘prescription’ from Chilean civil law, which is based on the idea that the possessor of a thing, or a right in a thing, for a determined period of time without title or ownership, can acquire a right of ownership on the general understanding that the prior owner or title holder has lost possession and done nothing to recuperate it.¹²⁴ The basis for prescription, and therefore regularisation, is ‘longstanding possession’.¹²⁵

In order to regularise an unregistered water right an applicant must prove uninterrupted water use since 1976 (five years before the commencement of the *Water Code*),¹²⁶ adopting the standard for prescription of real estate in Chile’s *Civil Code 1855* (Chile).¹²⁷ Secondly, the use must have been conducted ‘without force or secrecy’, and ‘without recognising the rights of others’,¹²⁸ requirements similar to those to establish adverse possession at common law enabled to varying extents in the legislation of Australian states: ‘physical control that is open rather than secret, peaceful rather than

¹¹⁸ *Civil Code 1855* (Chile) art 595; *Water Code* art 5.

¹¹⁹ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [4].

¹²⁰ Vergara Blanco, above n 51, 327.

¹²¹ *Constitution 1980* (Chile) art 20.

¹²² This convention was established pursuant to *Indigenous Law* transitory art 3 item 2. See *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [8].

¹²³ See Vergara Blanco, above n 51, 327–33; Dinko Tomislav Rendic Véliz, *Derechos de Agua y Pueblos Indígenas: Especial Referencia a los Derechos Ancestrales de la Comunidad Indígena de Toconce* [Water Rights and Indigenous Peoples: Special Reference to the Ancestral Rights of the Indigenous Community of Toconce] (Librotecnia, 2009) 148–9.

¹²⁴ *Civil Code 1855* (Chile) art 2492.

¹²⁵ Vergara Blanco, above n 51, 347–9.

¹²⁶ *Water Code* transitory art 2.

¹²⁷ *Civil Code 1855* (Chile) art 2508.

¹²⁸ *Water Code* transitory art 2.

forceful, and without the actual consent of the true owner'.¹²⁹ The courts have applied the process of regularisation in conjunction with article 7 of *Decree Law 2.603 1979* (Chile), which deemed the person making 'uso efectivo', or 'productive use', of a water right to be its owner.¹³⁰

The regularisation process in transitory article 2 has also been used by other indigenous communities in Chile to recognise customary water use and obtain a *derecho de aprovechamiento* without recourse to article 64,¹³¹ sometimes relying on protections in the International Labour Organisation's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* ('Convention 169').¹³² However, my focus here is on the recognition of *ancestral* water rights pursuant to article 64 as, reminiscent of native title, problems of continuity and priority have undermined the potential for the regularising courts to recognise such rights in Chile.

A The Problem of Continuity

Because article 64 seeks to recognise *ancestral* rights,¹³³ which find their origin in pre-Columbian water practices, it has similar shortcomings to those of the native title recognition model in Australia. The Chilean courts have construed rights under article 64 as *ancestral*, relying on their description as such under another provision of the *Indigenous Law*,¹³⁴ although the *Indigenous Law* provides no definition for *ancestral*. According to the Spanish Language Dictionary, the Spanish word 'ancestral' can refer to both 'belonging and relative to ancestors' or 'traditional and of remote origin'.¹³⁵ In fact, the word only appears twice in the *Indigenous Law*, its other appearance being in article 26, which provides that the Minister for Planning and Cooperation can establish areas of indigenous development in territorial spaces where indigenous ethnicities have lived '*ancestralmente*' ('ancestrally').

¹²⁹ Hepburn, *Principles of Property Law*, above n 115, 64, referring to the test from *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, 475 (Bowen CJ in Eq). See also *Riley v Penttila* [1974] VR 547: it must also be established that the person intended to possess the land adversely. But Hepburn also makes a distinction between 'adverse possession' (a right based on limitation) and 'long standing use' (a right based on prescription): Hepburn, *Principles of Property Law*, above n 115, 64. The distinction between prescription and limitation appears not to apply in the same way in Chile where prescription appears to be the equivalent to adverse possession. See, eg, *Limitation of Actions Act 1958* (Vic) ss 8, 15, 18, 20.

¹³⁰ See, eg, *Comunidad Atacameña Toconce con Essan SA*, Corte Suprema de Chile [Supreme Court of Chile], No 986-2003 (22 March 2004) 6.

¹³¹ See Corporación Nacional de Desarrollo Indígena [National Indigenous Development Corporation] and Dirección General de Aguas [General Water Directorate], 'Convenio Dirección General de Aguas y Corporación Nacional de Desarrollo Indígena' [Convention between the National Indigenous Development Corporation and General Water Directorate] (Chile, Interdepartmental Convention, 2000) (copy on file with author).

¹³² *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, signed 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

¹³³ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [8]; *Comunidad Atacameña Toconce con Essan SA*, Corte Suprema de Chile [Supreme Court of Chile], No 986-2003 (22 March 2004) [7].

¹³⁴ *Indigenous Law* transitory art 3 item 2.

¹³⁵ Real Academia Española, *Ancestral* (2017) Diccionario de la Lengua Española [Spanish Language Dictionary] <<http://lema.rae.es/>>.

Some courts and commentators have alluded to theories of legal pluralism and argued that the recognition of indigenous water rights in article 64 represents recognition of indigenous law-making systems,¹³⁶ however, the rights more accurately arise out of their ‘historical possession’. The courts describe *ancestral* water rights as having their origins in ‘time immemorial’,¹³⁷ reflecting terminology from early United States indigenous land rights jurisprudence.¹³⁸ In contrast to Australian native title, which finds its origins in the ‘traditional laws and customs’ of the native title group, *ancestral* water rights arise out of the historical use of the resources by indigenous groups,¹³⁹ in an approach reminiscent of United States¹⁴⁰ and Canadian jurisprudence.¹⁴¹ This ‘historical use’ approach is consistent with the Chilean approach to indigenous title more generally as being based in ‘immemorial occupation and use’.¹⁴² It also accords with the framing of ancestral rights to land and resources in inter-American jurisprudence, as rooted in ‘historical possession’.¹⁴³ The historical use is a ‘customary’ use, because it does not derive from a registered title or *acto de autoridad* (administrative act).¹⁴⁴

Ancestral water rights may be recognised under article 64 where indigenous-specific landholders can show that they have used specific water resources since pre-sovereignty times. The National Indigenous Development Corporation routinely commissions evidence on behalf of indigenous communities to accredit *ancestral* use, since time immemorial, and the court commonly refers to evidence of the antiquity of water

¹³⁶ *Corporación Movimiento Unitario Campesino y Etnias de Chile con Dirección General de Aguas*, Corte Suprema de Chile [Supreme Court of Chile], No 7899-2013 (5 May 2014) [9]. Interview with Nancy Yáñez (Santiago, 22 November 2011); Interview with María Angélica Alegría (Santiago, 17 November 2011).

¹³⁷ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [5], [8]; *Comunidad Atacameña Toconce con Essan SA*, Corte Suprema de Chile [Supreme Court of Chile], No 986-2003 (22 March 2004) [2]–[3].

¹³⁸ See, eg, *Coos Bay, Lower Umpqua and Siuslaw Indian Tribes v United States*, 87 Ct Cl 143 (1938). See generally Young, above n 72, 86 [4.2.1]; *Mabo [No 2]* (1992) 175 CLR 1, 189 (Toohey J); *Milirrpum v Nabalco Pty Ltd* [1971] 17 FLR 141, 152 (Blackburn J).

¹³⁹ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [5], [8]; *Comunidad Atacameña Toconce con Essan SA*, Corte Suprema de Chile [Supreme Court of Chile], No 986-2003 (22 March 2004) [2]–[3].

¹⁴⁰ The approach taken in the United States jurisprudence is that the source of ‘Indian title’ is the indigenous group’s exclusive use and occupation of land over a long period of time. See, eg, *United States v Santa Fe Public Railroad Company*, 314 US 339 (1941).

¹⁴¹ The Canadian Aboriginal title cases also emphasise occupation of land prior to the acquisition of sovereignty as the source of a sui generis title. *Calder v Attorney-General of British Columbia* [1973] SCR 313, 368–9, 372–5 (Hall J); *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1082 [114] (Lamer CJ, Cory and Major JJ); *Tsilhqot’in Nation v British Columbia* [2014] 2 SCR 257, 273 [14] (Vickers J).

¹⁴² Gonzalo Aguilar Cavallo, ‘El Título Indígena y su Aplicabilidad en el Derecho Chileno’ [Indigenous Title and its Application in Chilean Law] (2005) *Revista Ius Et Pax* 11(1) 269, 271–2.

¹⁴³ See, eg, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (ser C) No 79, [87(b)] (31 August 2001); *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (ser C) No 172, [96] (28 November 2007).

¹⁴⁴ Rendic Véliz, above n 123, 142.

infrastructure and agricultural land (terraces).¹⁴⁵ For example, in *Comunidad Atacameña Toconce con Essan SA* the Supreme Court accepted:

with the testimony of the applicant it has been accredited that since time immemorial the inhabitants of Toconce have made an uninterrupted use of the waters from the river for human and animal consumption and for irrigation, as owners and in sight of the whole world, with the consequence that this is taken as established the use of the waters in the terms indicated. This was corroborated in addition during the site inspection made by the tribunal.¹⁴⁶

The expectation that *ancestral* water rights will be established by evidence of historical use, since time immemorial, is reinforced in the process of regularisation, which requires an applicant for regularisation to prove uninterrupted (productive) water use since five years prior to the commencement of the *Water Code* (ie, 1976). This proof is usually provided in a technical report prepared by the General Water Directorate, based on an inspection of construction and maintenance of physical water infrastructure such as canals and wells.¹⁴⁷ As an example, the Court in *Asociación Atacameña de Regantes y Agricultores Aguas Blancas* accepted evidence from the General Water Directorate's technical report in satisfaction of the requirement for uninterrupted use:

It must be kept in mind, that the report referred to highlights that it was satisfied that the antiquity of the stone works found in the majority of water sources, as well as the rustic irrigation works (terraces), accredit an immemorial use of the resource.¹⁴⁸

Continuity problems also affect the Chilean *ancestral* rights recognition model. Many indigenous groups in Chile are unable to prove that they have made uninterrupted historical use of particular water resources as, due to widespread dispossession of indigenous territories, in many situations indigenous groups have not continued to use water resources since pre-sovereignty times.¹⁴⁹ Others do not have the finance needed to construct or maintain water infrastructure.¹⁵⁰ There is also uncertainty as to whether *ancestral* water rights can adapt or evolve over time. My study of regularisation cases in the second region of Antofagasta revealed a combination of irrigated agriculture and grazing as the main purposes for which indigenous applicants sought water rights in

¹⁴⁵ See, eg, *Comunidad Atacameña Toconce con Essan SA*, Corte Suprema de Chile [Supreme Court of Chile], No 986-2003 (22 March 2004) [2]; *Alejandro Papic con Comunidad Indígena Aymara Chuzmira y Usmagama*, Corte de Apelaciones de Iquique [Iquique Court of Appeal] (Chile), No 817-2006 (9 April 2008) [10] (second instance decision).

¹⁴⁶ *Comunidad Atacameña Toconce con Essan SA*, Corte Suprema de Chile [Supreme Court of Chile], No 986-2003 (22 March 2004) [2].

¹⁴⁷ Interview with Carlos Herrera Inzunza (Temuco, 11 November 2011). Herrera was a water lawyer working for the National Indigenous Development Corporation at the time of interview.

¹⁴⁸ *Inscripción Sentencia Derechos de Aprovechamiento de Aguas Asociación Atacameña de Regantes y Agricultores de Aguas Blancas* (Unreported, Segundo Juzgado Civil de Calama, Chile [Second Civil Court of Calama, Chile], Nr-Ii-1381, 19 November 1997) [2].

¹⁴⁹ See Nancy Yáñez and Raúl Molina (eds), *Las Aguas Indígenas en Chile* [Indigenous Waters in Chile] (LOM Ediciones, 2011) 60, 105–6.

¹⁵⁰ Interview with Carlos Herrera Inzunza (Temuco, 11 November 2011). But see Interview with Juan Carlos Araya (Santiago, 15 November 2011). Araya, a lawyer for the National Indigenous Development Corporation, argues that it is not necessary for a community to have canals to show use and has in some cases managed to regularise rights without productive use, but admits that the approach is usually opposed.

reliance on article 64,¹⁵¹ although some cases also included sustaining wetlands.¹⁵² The use of water for agriculture and grazing would probably come within the use of water for commercial purposes as envisaged in this article, however, there is still an expectation by Chilean courts, and government officials, that indigenous water use will be consistent with *ancestral*, or pre-sovereignty, practices. Cuadra explains, ‘not just any use of water enjoys legal recognition, rather only those that satisfy certain conditions’ to which he adds that it must be an ‘antique use’ of the water resource,¹⁵³ carried out continuously since pre-Columbian times, which, as we have seen above, may be evidenced by antique water infrastructure.

The requirement to prove productive use in the process of regularisation also means that *ancestral* water rights have typically been recognised in reliance on article 64 for the consumptive use of surface waters only.¹⁵⁴ It would be difficult for an applicant for regularisation to prove productive use that is non-consumptive or subterranean in the absence of water infrastructure. This is despite the fact that clause 5 of an interdepartmental agreement between the National Indigenous Development Corporation and the General Water Directorate on the regularisation process provides that non-consumptive and subterranean water rights are also contemplated within the concept of *ancestral* rights.¹⁵⁵

Thus, the problem of continuity limits the potential to recognise *ancestral* water rights under article 64 of the *Indigenous Law* in a similar way as seen with native title rights to water in Australia. Only those groups who have continued to maintain their water rights since pre-sovereignty times have had water rights recognised, and regularised, in reliance on article 64.¹⁵⁶ Yet, by the late 20th century other right holders held almost all *derechos de aprovechamiento* in Chile.¹⁵⁷ Some have observed that article 64 adds little

¹⁵¹ See, eg, *Inscripción Sentencia Derechos de Aprovechamiento de Aguas Asociación Atacameña de Regantes y Agricultores de Aguas Blancas* (Unreported, Segundo Juzgado Civil de Calama, Chile [Second Civil Court of Calama, Chile], Nr-Ii-1381, 19 November 1997); *Inscripción Sentencia Derechos de Aprovechamiento de Aguas Asociación Atacameña de Regantes y Agricultores del Río Vilama* (Unreported, Segundo Juzgado Civil de Calama, Chile [Second Civil Court of Calama, Chile], Nr-Ii-1391, 25 November 1997).

¹⁵² See, eg, *Inscripción Sentencia Derechos de Aprovechamiento de Aguas Comunidad Atacameña de Peine* (Unreported, Segundo Juzgado Civil de Calama, Chile [Second Civil Court of Calama, Chile], Nr-Ii-1383, 19 November 1997); *Inscripción Sentencia Derechos de Aprovechamiento de Aguas Comunidad Atacameña de Cupo* (Unreported, Segundo Juzgado Civil de Calama, Chile [Second Civil Court of Calama, Chile], Nr-Ii-1387, 19 November 1997).

¹⁵³ Manuel Cuadra, ‘Teoría y Práctica de los Derechos Ancestrales de Agua de las Comunidades Atacameñas’ [Practical Theory of the Ancestral Water Rights of the Atacameña Communities] (2000) 19 *Estudios Atacameños* 93, 101–2.

¹⁵⁴ Espinoza Quezada, above n 112.

¹⁵⁵ Corporación Nacional de Desarrollo Indígena [National Indigenous Development Corporation] and Dirección General de Aguas [General Water Directorate] ‘Convenio Marco para la Protección, Constitución y Reestablecimiento de los Derechos de Agua de Propiedad Ancestral de las Comunidades Aymaras y Atacameñas’ [Convention for the Protection, Constitution and Reestablishment of the Ancestral Water Property Rights of the Aymara and Atacameña Communities] (Interdepartmental Convention, 1997) (Chile) (copy on file with author) Part II [5].

¹⁵⁶ See Yáñez and Molina, above n 149, 106.

¹⁵⁷ Jessica Budds, ‘Power, Nature and Neoliberalism: The Political Ecology of Water in Chile’ (2004) 25(3) *Singapore Journal of Tropical Geography* 322, 326.

to the procedures already available to regularise historical water use in the transitory provisions of the *Water Code*.¹⁵⁸

B The Problem of Priority

Another similarity between recognition models in both countries is that the Chilean model excludes situations where *ancestral* water rights would conflict with water use rights held by third parties. In contrast to the future acts regime under the *Native Title Act*, which prioritises the future granting of water rights to third parties, Chilean law, at least, provides for *ancestral* water rights to take priority as against the water use rights sought by third parties in the future.¹⁵⁹ This means that, since the passage of the *Indigenous Law*, third parties must not be allocated new *derechos de aprovechamiento* if this would prevent normal water supply to the indigenous communities.¹⁶⁰ Whether ‘normal water supply’ would be prevented is considered in a technical report from the National Indigenous Development Corporation evaluating the impact on indigenous communities of all new water rights applications in indigenous areas of Chile’s first and second regions.¹⁶¹ The Corporation contracts lawyers, anthropologists and geographers to check whether a community will be affected by a new application and if necessary recommends that the application is refused.¹⁶² However, on the question of what is meant by ‘normal water supply’ there is little guidance, being a case-by-case assessment made by the Corporation when preparing its report. Of course, because rights to use surface water resources in Chile’s north were already largely allocated to third parties at the commencement of the *Indigenous Law*, the protection of *ancestral* water rights from the future granting of other *derechos de aprovechamiento* is of less consequence as might first appear.

As regards the *derechos de aprovechamiento* already held by third parties, article 64 item 1 prioritises those rights ahead of *ancestral* water rights, by providing that *ancestral* water rights can only be recognised ‘without prejudice to the rights that third parties have registered in accordance with the *Water Code*’.¹⁶³ Again, because most water rights were already held by third parties, recognising indigenous water rights would prejudice third parties, and be incapable of recognition, in many situations.

¹⁵⁸ See Interview with Manuel Cuadra (Antofagasta, 23 November 2011).

¹⁵⁹ *Indigenous Law* art 64 item 2.

¹⁶⁰ See *Codelco Chile División Chuquicamata con Dirección General de Aguas* (Unreported, Corte de Apelaciones de Antofagasta, Chile [Court of Appeal of Antofagasta, Chile], No 14003-2013, 15 May 2014), in which the Court of Appeal upheld a decision of the General Water Directorate refusing an application for an authorisation to explore and extract subterranean waters on fiscal lands on the basis that this would cause prejudice to the indigenous occupiers of the land, whose water rights were protected under article 64.

¹⁶¹ Corporación Nacional de Desarrollo Indígena [National Indigenous Development Corporation] and Dirección General de Aguas [General Water Directorate] ‘Convenio Marco para la Protección, Constitución y Reestablecimiento de los Derechos de Agua de Propiedad Ancestral de las Comunidades Aymaras y Atacameñas’ [Convention for the Protection, Constitution and Reestablishment of the Ancestral Water Property Rights of the Aymara and Atacameña Communities] (Interdepartmental Convention, 1997) (Chile) (copy on file with author) Part II [6].

¹⁶² Interview with Juan Carlos Araya (Santiago, 15 November 2011). The problem, Araya explains, is in relation to new applications with respect to subterranean waters. As there are few studies of subterranean waters it is hard to anticipate the effect on surface waters.

¹⁶³ *Indigenous Law* art 64 item 1.

Notwithstanding, the courts have continued to recognise *ancestral* water rights in reliance on article 64 in Chile's north as part of the regularisation process,¹⁶⁴ mostly for minimal flows still being customarily used by indigenous communities, available within the water system.¹⁶⁵ According to a former National Indigenous Development Corporation lawyer, the *ancestral* water rights regularised in reliance on article 64 are not always 'viable economically'.¹⁶⁶

The problem of priority underpins the Supreme Court of Chile's landmark 2009 decision in *Alejandro Papic Domínguez con Comunidad Indígena Aymara Chusmiza y Usmagama* ('*Chusmiza*').¹⁶⁷ In that case, the indigenous communities of Chusmiza and Usmagama claimed to have used the thermal mineral waters emanating from the Chusmiza spring for irrigation and human and animal consumption, distributed via an array of wells, canals and other infrastructure, since time immemorial.¹⁶⁸ However, a water bottling company held *derechos de aprovechamiento* authorising the use of water from the mineral spring, as well as the title to the land on which it was found, undermining the continued use of the waters by the communities.¹⁶⁹ Despite the fact that the bottling company held various *derechos de aprovechamiento*, which the company claimed would be prejudiced by the decision,¹⁷⁰ the Court in *Chusmiza* recognised the communities' water rights under article 64, with reference to what it saw as the provision's objective. That was: the repopulation, subsistence and development of rural indigenous communities in Chile's north, which depend on adequate water supply.¹⁷¹ With this objective in mind, and emboldened by International Labour Organisation *Convention 169*,¹⁷² the Supreme Court emphasised that the communities'

¹⁶⁴ According to General Water Directorate records, in the second region of Antofagasta a total flow of 2729.6 litres per second of water was allocated to indigenous communities between 1995 and 2012 in reliance on article 64: Espinoza Quezada, above n 112.

¹⁶⁵ Espinoza Quezada, above n 111122.

¹⁶⁶ Interview with Diego Sotomayor (Santiago, 23 December 2013).

¹⁶⁷ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009).

¹⁶⁸ *Agua Mineral Chusmiza Saic con Comunidad Indígena Aymara Chusmiza*, Juzgado de Letras de Pozo Almonte [Pozo Almonte Civil Court] (Chile), No 1194-1996 (31 August 2006) 11–12 (first instance decision).

¹⁶⁹ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile] No 2840-2008 (25 November 2009) [1].

¹⁷⁰ These registered *derechos de aprovechamiento* are listed in *Agua Mineral Chusmiza Saic con Comunidad Indígena Aymara Chusmiza*, Juzgado de Letras de Pozo Almonte [Pozo Almonte Civil Court] (Chile), No 1194-1996 (31 August 2006) 2 (first instance decision), referring to *Decreto No 1540*, 3 August 1948, Juzgado de Letras de Pozo Almonte, Resolution of 4 February 1983, and Juzgado de Letras de Pozo Almonte, Resolution No 406 of 29 September 1983; *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [3] referring to judgment No 3695-2005. The company inherited a historical water allocation for 10 litres per second and 10 000 litres per day granted by Supreme Decree by the Ministry of Public Works in 1948, which was regularised by the Civil Court under the transitory provisions to the *Water Code* in 1983. It also held a mixture of consumptive and non-consumptive registered rights to 50 cubic metres per day and five litres per second originating in 1996/1997 whose validity was confirmed by a separate decision of the Constitutional Division of the Supreme Court in 2005.

¹⁷¹ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [7].

¹⁷² *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, signed 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

water rights arose prior to the registered *derechos de aprovechamiento* held by the company:

Of course, it is worth remembering that in this case that which is regularised is the ancestral right of the applicant indigenous community, whose members from time immemorial have made uninterrupted use of the waters for human and animal consumption and irrigation. It follows that the water right recognised to the Aymara community is therefore prior to the constitution of water use rights created in favour of third parties and as a corollary; it is prior to the origin of the registered rights of the Company.¹⁷³

Presumably, because the communities were already using the water there could be no prejudice to the third party by recognising the communities' right.¹⁷⁴ In fact, the Court reasoned, the communities' water right already exists; it is simply being registered in order to provide certainty as to the amount of water being used, at what location and by whom.¹⁷⁵

The *Chusmiza* case has been described as a 'triumph' of indigenous water rights over the registered water use rights of a non-indigenous party, showing legal pluralism in action.¹⁷⁶ Some have criticised the decision for causing prejudice to the holder of legally valid water use rights,¹⁷⁷ and others for producing legal uncertainty around water rights ownership.¹⁷⁸ The lawyer for the water bottling company has described the result in *Chusmiza* as a form of compulsory redistribution, without compensation.¹⁷⁹ In reality, the *Chusmiza* dispute remains unresolved and illustrates the difficulty inherent in recognising pre-sovereignty water rights many years after the acquisition of sovereignty, in the presence of other rights.¹⁸⁰ The case shows that, in situations of full resource allocation, it is impossible to simply recognise indigenous water rights without

¹⁷³ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [5].

¹⁷⁴ According to Sotomayor, a former National Indigenous Development Corporation lawyer, the courts have focused on the regularisation procedure established in the *Water Code*, rather than the requirements of art 64. In the process of regularisation, provided that the applicant can prove it is currently using the water the courts have no option but to approve the regularisation: Interview with Diego Sotomayor (Santiago, 23 December 2013).

¹⁷⁵ *Chusmiza*, Corte Suprema de Chile [Supreme Court of Chile], No 2840-2008 (25 November 2009) [4].

¹⁷⁶ See Luis Carvajal and Katerina Kliwadenko, 'Chusmiza y Usmagama, Usurpación y Recuperación de Aguas Ancestrales' in Sara Larraín and Pamela Poo (eds), *Conflictos por el Agua en Chile: Entre los Derechos Humanos y las Reglas del Mercado* [Water Conflicts in Chile: Between Human Rights and Market Rules] (2010) 98, 105; Interview with Nancy Yáñez (Santiago, 22 November 2011); Yáñez and Molina, above n 149, 144–6.

¹⁷⁷ Interview with Gonzalo Arevalo (Santiago, 18 November 2011).

¹⁷⁸ Interview with Rodrigo Weisner (Santiago, 18 November 2011). Weisner, the former director of the General Water Directorate, argues that if the Supreme Court was inclined to recognise the communities' rights to the waters from the spring it should have cancelled the company's *derechos de aprovechamiento* so as to prevent an over-allocation, although presumably the Court would not have had the jurisdiction to do so as part of the cassation appeal.

¹⁷⁹ Interview with Gonzalo Arevalo (Santiago, 18 November 2011).

¹⁸⁰ *Aymara Indigenous Community of Chusmiza-Usmagama and its Members v Chile*, Petition 1288-06, Inter-Am Comm'n HR, Report No 29/13 (20 March 2013). See also Interview with Nancy Yáñez (Santiago 22 November 2011).

impacting on the water use rights of third parties. In such situations, some form of redistribution is necessary.

V (RE)ALLOCATING INDIGENOUS WATER RIGHTS

The Chilean *Indigenous Law* provided another mechanism for indigenous water rights, in addition to article 64. It also established an Indigenous Land and Water Fund ('Fund') to finance the allocation of land and water rights to indigenous groups.¹⁸¹ The Fund subsidises the allocation of water use rights to indigenous-specific landholders who would not be able to make out *ancestral* water rights claims because they have not continued to make *ancestral* uses of water resources, and because third parties now hold rights to use the resources in question. The discussion of this Fund in the following section invites consideration of the potential for a similar redistributive mechanism to be used in Australia.

A Chile's Indigenous Land and Water Fund

The functions of the Fund include, pursuant to 20(c), 'to finance the constitution, regularisation or purchase of water use rights or finance works destined to obtain the resource'. The Fund has been used in northern Chile in conjunction with article 64 to finance the regularisation of *ancestral* water rights. It has also been used to finance the regularisation of indigenous water rights in other parts of Chile (without article 64) using the process provided for in transitory article 2 of the *Water Code*.¹⁸² However, of interest here, the Fund is used to finance the constitution and purchase of *derechos de aprovechamiento* for indigenous landholders throughout Chile, often in conjunction with government-sponsored indigenous economic development projects.¹⁸³

The water use rights acquired for indigenous landholders with the assistance of the Fund are the same as any other *derechos de aprovechamiento* in Chilean water law frameworks. They are held independent of land title and are exercisable for any (including commercial) purposes. If anything, indigenous landholders in Chile have been dissuaded from exercising their *derechos de aprovechamiento* for non-commercial purposes by the levying of 'fees for non-use' on the holders of *derechos de aprovechamiento* who do not use the water for 'productive purposes', introduced into the *Water Code* in 2005.¹⁸⁴ However, recent judicial and political developments suggest a disinclination to charge 'fees for non-use' to indigenous landholders.¹⁸⁵ Like

¹⁸¹ The main task of the Fund, set out in art 20 of the *Indigenous Law* is to 'grant subsidies for the acquisition of lands for indigenous people or communities (or part thereof) where the surface area of the respective community's lands is insufficient'.

¹⁸² See Corporación Nacional de Desarrollo Indígena [National Indigenous Development Corporation] and Dirección General de Aguas [General Water Directorate], 'Convenio Dirección General de Aguas y Corporación Nacional de Desarrollo Indígena' [Convention between the National Indigenous Development Corporation and General Water Directorate] (Interdepartmental Convention, 2000) (Chile) (on file with the author). See also Interview with Nancy Yáñez (Santiago, 22 November 2011).

¹⁸³ Interview with Diego Sotomayor (Santiago, 23 December 2013).

¹⁸⁴ *Water Code* art 129 bis 4.

¹⁸⁵ See *Corporación Movimiento Unitario Campesino y Etnias de Chile con Dirección General de Aguas*, Corte Suprema de Chile [Supreme Court of Chile], No 7899-2013 (5 May 2014), which

ancestral water rights, the *derechos de aprovechamiento* acquired are constitutionally protected rights of *propiedad*, roughly equivalent to a right of full ownership, or the estate of fee simple in the common law sense. The fact that the rights may be exclusive aids their application to commercial purposes, where water is taken from its flow and consumed in its totality.

The only way in which *derechos de aprovechamiento* acquired with the support of the Fund are different to the water use rights held by third parties, is that they are generally inalienable for 25 years applying a protection in article 22 item 1 of the *Indigenous Law*. This means that *derechos de aprovechamiento* acquired via the Fund typically remain outside of water markets for this period, unless administrative approval is obtained or the funds are repaid.¹⁸⁶ The rights can still, however, be transferred within and between indigenous communities of the same ethnicity.

The National Indigenous Development Corporation administers the Fund, receiving *derechos de aprovechamiento* from the state or private holders for allocation to indigenous communities.¹⁸⁷ Where rights to use particular water resources are not already fully allocated to third parties, *derechos de aprovechamiento* can simply be constituted or regularised in the name of indigenous communities and the Fund pays for the processes.¹⁸⁸ *Derechos de aprovechamiento* purchased for indigenous communities with assistance from the Fund are bought in the open market, and their title is transferred at the local Real Estate Office.¹⁸⁹ Regulations set out the factors the National Indigenous Development Corporation must consider before granting subsidies for water rights acquisition: the number of persons or size of the community, the deterioration or degradation of lands affected by a lack of water, the sanitary conditions of families located on the property affected by a lack of water, and agricultural benefits from irrigation for the lands affected.¹⁹⁰

found that fees for non-use could not be levied against indigenous communities holding *derechos de aprovechamiento* acquired with finance from the Indigenous Land and Water Fund because to do so would contravene the restriction on alienation of such rights under s 22 of the *Indigenous Law*. See also *Reforma el Código de Aguas, Examinando del Pago de Patente a Pequeños Productores Agrícolas y Campesinos, a Comunidades Agrícolas y a Indígenas y Comunidades Indígenas que se Señalan 2012* [Reform of the Water Code, Examining the Payment of Tax by Small Agricultural Producers, to Agricultural and Indigenous Communities Included] (Boletín No 8315-01) (Chile), which proposes to exempt indigenous people and communities under the indigenous law from fees for non-use.

¹⁸⁶ *Indigenous Law* art 22 item 2.

¹⁸⁷ *Indigenous Law* art 21. Regulations provide that the finance is a subsidy used to acquire water use rights, which indigenous communities or individuals can apply for in accordance with a number of conditions: *Decreto 395 Que Aprueba el Reglamento sobre el Fondo de Tierras y Aguas Indígenas 1994* [Decree 395 Approving the Indigenous Land and Water Fund Regulations 1994] (Chile).

¹⁸⁸ In order to ‘constitute’ new water rights, indigenous communities must apply to the General Water Directorate for new water rights in accordance with the process set out in *Water Code* art 140. The application must specify the name of the applicant at the water resource concerned, the quantity of water sought and its point of capture, the mode of extraction and type of right sought (i.e. whether consumptive or non-consumptive, permanent or eventual, continuous or discontinuous).

¹⁸⁹ *Water Code* arts 112–13.

¹⁹⁰ *Decreto 395 Que Aprueba el Reglamento sobre el Fondo de Tierras y Aguas Indígenas 1994* [Decree 395 Approving the Indigenous Land and Water Fund Regulations 1994] (Chile) art 8.

The allocation of water use rights to indigenous landholders with the support of the Fund is not limited by the problem of continuity in the same way as the recognition of *ancestral* rights pursuant to article 64. There is no express requirement in the Regulations to prove prior water use in order to access the Fund. It can, therefore, be used to finance acquisition of water use rights in situations where the indigenous community has no historical relationship with the particular water, or had its use interrupted at some point since sovereignty. However, reflecting the Government's intention that the Fund be used to support the economic development of indigenous lands, the National Indigenous Development Corporation assumes that water rights purchases will be financed for the general productive benefit of land, and there is an assumption that *derechos de provechamiento* will be provided for irrigation.¹⁹¹

The Fund was intended as a 'creative mechanism' to deal with the problem of priority by financing water rights acquisitions from third parties for allocation to indigenous-specific landholders.¹⁹² This redistribution is made possible by the unbundled status of *derechos de provechamiento*, and their availability for purchase in water markets, which means that water use rights may even be provided to indigenous landholders in situations where rights to use water resources are already fully allocated to third parties. Other right holders are not adversely impacted, as they are willing sellers and receive market price. The Fund does not necessarily allow indigenous communities in Chile to recoup their particular *ancestral* lands and waters, however, there is no doubt that it is an important supplement to the recognition of *ancestral* water rights in article 64. It responds to the reality that indigenous groups have, in most cases, been dispossessed their *ancestral* interests, and rights to use water resources historically used by indigenous landholders are now held by others. Instead of focusing on *historical* rights it responds to *ongoing* indigenous disadvantage in the distribution of water use rights.

Because water resources in many parts of Chile were approaching full allocation by the time the *Indigenous Law* was passed, with no share of *derechos de provechamiento* having previously been set aside for allocation to indigenous groups, purchases would be instrumental. However, the Chilean Government has been criticised for providing the Fund with inadequate finance.¹⁹³ Accordingly, the Chilean experience illustrates the importance of setting aside a share of water resources for future allocation to

¹⁹¹ *Decreto 395 Que Aprueba el Reglamento sobre el Fondo de Tierras Y Aguas Indigenas 1994* [Decree 395 Approving the Indigenous Land and Water Fund Regulations 1994] (Chile) art 8. See also Interview with Diego Sotomayor (Santiago, 23 December 2013). According to Sotomayor, of the 200 regularisation cases he worked on in the south of Chile, the vast majority were for agriculture while only a few were for grazing.

¹⁹² Solís and Luis, above n 50, 33.

¹⁹³ Camera de Diputados [House of Representatives], 'Discusión en Sala: Legislatura 325, Sesión 44. Fecha 21 de Enero, 1993' [Parliamentary Debates: Legislature 325, Session 44. Date 21 January 1993] in Biblioteca del Congreso Nacional de Chile (ed), 'Historia de la Ley No 19.253: Establece Normas sobre Protección, Fomento y Desarrollo de los Indígenas y Crea la Corporación Nacional de Desarrollo Indígena' [History of Law No 19.253 to Establish Norms for the Protection, Creation and Development of the Indigenous, and to Create the National Corporation of Indigenous Development] (Biblioteca del Congreso Nacional de Chile, 5 October 1993) 136, 190. See also Interview with Carlos Herrera Inzunza (Temuco, 11 November 2011). Inzunza, a lawyer for the National Indigenous Development Corporation explained that the Fund is financed significantly better for land acquisitions than for water.

indigenous-specific landholders prior to water resources reaching full allocation in order to reduce the cost of buying back water use rights from third parties in the future.

B The Potential for an ‘Indigenous Water Holder’ in Australia

Native title rights to water have the important function of recognising the traditional and cultural rights of native titleholders in water, and should continue to be accommodated as ‘environmental and public benefit’ outcomes. This may be achieved, for example, through planning for instream ‘cultural flows’, which may not require a water use right. However, there is little potential for native title rights to water to be recognised in the future for purposes like irrigation or industry. The problems with the native title recognition model are path dependent, because the focus of native title is the historical rights of indigenous groups, pursuant to traditional laws and customs that have been observed and acknowledged, in a substantially uninterrupted manner, since pre-sovereignty times. The idea of recognising pre-existing rights produces inevitable tensions around the continuity of indigenous rights since pre-sovereignty times and priority vis-a-vis other interests, because of the passage of time since the acquisition of sovereignty. The impact of both of these problems is to reduce the scope for commercial water rights.

1 *Beyond Recognition: Supplementing the Native Title Recognition Model*

Could the *Native Title Act* be amended to expand the application of native title rights to water to commercial purposes? The Australian Law Reform Commission has recently proposed a number of amendments to *Native Title Act* to better accommodate ‘commercial rights’, although it made no specific recommendation with respect to water.¹⁹⁴ Even if these reforms are implemented in the future, native title law and legislation, as a recognition mechanism, cannot do away entirely with the problem of continuity. Native title recognises ‘prior rights and interests’¹⁹⁵ pursuant to traditional laws and customs that were not recognised at the acquisition of sovereignty, meaning that the native title applicant must prove that its rights enjoy continuity with pre-sovereignty interests.¹⁹⁶ This is both difficult in practice and directs recognition to pre-sovereignty resource use. Moreover, third parties have often acquired rights to the same resources since the acquisition of sovereignty, which limits further the potential for recognition or the exercise of any rights that are capable of recognition.

The ‘traditional law and custom’ approach to proving native title rights in Australia is often held responsible for Australia’s particular predicament with ‘continuity’.¹⁹⁷ Some, like Pearson, have suggested that the problem of continuity could be ameliorated if native title rights were characterised as arising not out of traditional laws and customs

¹⁹⁴ Australian Law Reform Commission, above n 74, 249.

¹⁹⁵ *Native Title Act* preamble.

¹⁹⁶ See also *Mabo [No 2]* (1992) 175 CLR 1, 58–60 (Brennan J).

¹⁹⁷ See, eg, Young, above n 72, 358–65; Kirsten Anker, ‘Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*’ (2004) 28 *Melbourne University Law Review* 1.

but out of historical possession and use,¹⁹⁸ relying on the judgment of Toohey J in *Mabo [No 2]*¹⁹⁹ and American and Canadian approaches to establishing native title,²⁰⁰ which better accommodate the evolution or change of native title rights and interests over time. Toohey J's reasoning provided that because such a 'possessory title' is sourced in the common law, it arises upon the acquisition of sovereignty and there is no need to prove any pre-sovereignty laws and customs, merely occupation at the time of sovereignty.²⁰¹ Indigenous occupation at sovereignty is recognised by the common law, becoming a fee simple title, even if the indigenous inhabitants have since lost possession.²⁰²

Indigenous rights to land and resources in Chile can be best characterised as arising out of 'historical possession' or use, consistent with Inter-American jurisprudence.²⁰³ Nonetheless, the problem of continuity has limited the potential to recognise *ancestral* water rights in Chile, in much the same way as has occurred with respect to native title rights to water in Australia. Historical possession and use of land and resources may be easier to prove than the content of pre-sovereignty laws and customs authorising resource use, but recognition mechanisms based on historical possession cannot avoid the problem of continuity altogether. All recognition mechanisms are an attempt to recognise historical rights and raise inevitable tensions around continuity of connection because of the period of time that has elapsed since colonisation.²⁰⁴

Even if the *Native Title Act* were amended to deem certain cases as satisfying the continuity requirement, as the Australian Law Reform Commission has suggested,

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- ¹⁹⁸ Pearson, 'Native Title at Common Law', above n 10; Noel Pearson, 'Land Is Susceptible of Ownership' in Marcia Langton et al (eds), *Honour among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 83. See also Brady Pohle, 'Possessory Title in the Context of Aboriginal Claimants' (1995) 11 *Queensland University of Technology Law Journal* 200.
- ¹⁹⁹ (1992) 175 CLR 1, 175–217 (Toohey J). The theory discussed by Toohey J, drawing on the work of McNeil in his book *Common Law Aboriginal Title* published in 1989, provides that indigenous inhabitants in possession of their lands as at colonisation are presumed to have a fee simple estate, unless someone else can claim a better right; see Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989).
- ²⁰⁰ The approach taken in the United States jurisprudence is that the source of 'Indian title' is the indigenous group's exclusive use and occupation of land over a long period of time: see, eg, *United States v Santa Fe Public Railroad Company*, 314 US 339 (1941). The Canadian Aboriginal title cases also emphasise occupation as the source of title, although the requirement to prove exclusive occupation is fixed at the acquisition of sovereignty: see *Calder v Attorney-General of British Columbia* [1973] SCR 313, 368–9, 372–5; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1082 [114]; *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257, 273 [14].
- ²⁰¹ *Mabo [No 2]* (1992) 175 CLR 1, 178.
- ²⁰² Ibid 210 (Toohey J), on the basis that prior possession is a better right.
- ²⁰³ See *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (ser C) No 79, [83(b)] (31 August 2001), where the Court found that possession of land was all that was required to be proved in order to obtain state recognition. Where communities have lost possession since colonisation through no fault of their own they retain the right to property in their traditional lands: *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (ser C) No 172, [96] (28 November 2007).
- ²⁰⁴ But see *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257, 277 [25], 284 [45]. In that case the Supreme Court of Canada held that in terms of Canadian Aboriginal title, continuity is only a requirement where current occupation is used to establish an inference of pre-sovereignty occupation.

recognition of native title rights to water would still in many cases be impacted by the inconsistent grant of other water use rights under state water legislation.²⁰⁵ A similar problem of priority undermines the potential to recognise *ancestral* water rights under article 64 of the *Indigenous Law*, leaving little scope for recognition. As discussed above, in recent jurisprudence, the courts have attempted to recognise *ancestral* water rights despite the presence of other users, in an effort to support the repopulation of indigenous territories where indigenous-specific landholders have been dispossessed of their water rights. However, the cases show that in the case of fully allocated water resources, a recognition mechanism cannot provide for indigenous water rights without some form of redistribution.

Another reason for looking outside the native title recognition model is practical. Native title is a long, difficult, expensive, and ad hoc approach to resolving indigenous claims to land and resources.²⁰⁶ Even if the native title recognition model for indigenous water rights were to evolve to encompass commercial rights, as some commentators predict, it could take years or even decades for indigenous people to benefit from recognition. The need to address indigenous disadvantage, however, is immediate. The First Peoples' Water Engagement Council has urged:

Delaying the elevation of indigenous rights to water for economic development on the water reform agenda will impede the effectiveness of water as a tool for improving the personal and economic wellbeing of Indigenous Australians.²⁰⁷

The adoption of market mechanisms for the regulation of water resources in Australia adds further urgency to demands for indigenous water rights, by making it easier for third parties to acquire the right to use water on or affecting indigenous lands. Competitive water markets are designed to grow to encompass more traders and more water use rights, meaning that there will be less water available for responding to indigenous water demands in the future.²⁰⁸

Native title was never intended to be a comprehensive solution for indigenous land and resource rights in Australia. The *Native Title Act* was intended to be part of a social justice package aimed at indigenous social and economic development. As the then Prime Minister Keating observed:

The government has always recognised that despite its historic significance, the Mabo decision gives little more than a sense of justice to those Aboriginal communities whose native title has been extinguished or lost without consultation, negotiation or

²⁰⁵ *Native Title Act* ss 24JA, 24KA, 24HA(4)–(5), (7), 238.

²⁰⁶ Australian Law Reform Commission, above n 74, 15–16. See generally with respect to indigenous water rights Poh-Ling Tan and Sue Jackson, 'Impossible Dreaming – Does Australia's Water Law and Policy Fulfil Indigenous Aspirations?' (2013) 30(2) *Environmental and Planning Law Journal* 132, 137.

²⁰⁷ Lawlab, 'Options for an Indigenous Economic Water Fund (IEWF)' (Options Paper, First Peoples' Water Engagement Council (FPWEC), 20 April 2012) 5.

²⁰⁸ See North Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, 'A Policy Statement on North Australian Indigenous Water Rights' (Policy Statement, November 2009) <<http://www.nailsma.org.au>>. The Alliance has framed its water claims as 'a pragmatic response to the [Council of Australian Governments] Water Reform Agenda, specifically the [National Water Initiative]': at 2.

compensation. Their dispossession has been total, their loss has been complete. The government shares the view of ATSIC, Aboriginal organisations and the Council for Aboriginal Reconciliation, that justice, equality and fairness demand that the social and economic needs of these communities must be addressed as an essential step towards reconciliation.²⁰⁹

If Australian governments are to completely respond to the ongoing exclusion of indigenous Australians' experience from water law frameworks, it does not make sense to continue to rely on native title alone: an ad hoc and partial response to indigenous land and resource rights in Australia. Besides other reasons, to restrain indigenous water rights in this way would disregard the vast amounts of indigenous land held outside of native title under indigenous land rights legislation, including almost half of the Northern Territory held under the *Aboriginal Land Rights (Northern Territory Act) 1976* (Cth).²¹⁰

Could legislation not be used in Australia to establish a mechanism that allocates commercial water use rights to indigenous landholders, as done in Chile? There are already a few discrete examples where legislation has been used in Australia to allocate commercial water rights to indigenous groups, outside of the native title process. For example, Aboriginal 'access licences' may be allocated under the *Water Management Act 2000* (NSW), some of which are exercisable for commercial purposes. Unfortunately, Aboriginal access licences have enjoyed little take-up in New South Wales,²¹¹ perhaps because the licences only authorise the use of small quantities of water, and are only available in well-watered coastal areas and not the over-allocated Murray Darling Basin. In Queensland and the Northern Territory, there are examples of indigenous reserves being included in water plans to set aside a share of the consumptive pool of water to support indigenous 'economic ... aspirations',²¹² although Australian governments have distanced themselves from the indigenous water reserve policies in recent years.²¹³

Despite their limitations, the existence of each of these allocation mechanisms transcends the assumption in Australian law and related debates that indigenous water rights are (or should be) restricted to non-commercial purposes. However, indigenous exclusion from water law frameworks is an all-encompassing problem in Australia, which deserves a comprehensive solution. It would not be the first time that a statutory

²⁰⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2882 (Paul Keating, Prime Minister).

²¹⁰ Australian Government, 'Our North, Our Future: White Paper on Developing Northern Australia' (2015) 27 <<https://northernaustralia.dpmc.gov.au>>.

²¹¹ According to a scoping study of indigenous water licence allocations by Altman and Arthur in 2009, water allocated to Aboriginal licensees in New South Wales made up no more than 0.7 per cent of total water access licence allocations: J C Altman and W S Arthur, 'Commercial Water and Indigenous Australians: A Scoping Study of Licence Allocations' (Working Paper No 57/2009, Centre for Aboriginal Economic Policy Research, September 2009) 9.

²¹² See, eg, *Cape York Peninsula Heritage Act 2007* (Qld) s 27; Northern Territory Government, 'Draft Water Allocation Plan: Ooloo Aquifer' (Draft Plan, February 2012).

²¹³ Phoebe Stewart, 'Indigenous Water Reserve Policy Tap Turned Off', *ABC News* (online), 10 October 2013 <<http://www.abc.net.au/news/2013-10-09/nt-indigenous-water-reserve-policy-dropped/5012152>>.

allocation model was used in Australia because of the limitations of the native title process. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), for example, was a political response to the failure of the court to recognise native title in *Milirrpum v Nabalco Pty Ltd*.²¹⁴

2 *An Indigenous Water Access Entitlement*

Indigenous landholders, with rights to land either under native title or land rights legislation, could be accorded a statutory entitlement to take and use water on their lands for purposes extending to commercial use, as distinct from the existing traditional and cultural water rights held by native titleholders. A legislative entitlement would enjoy some protection from arbitrary change, noting that indigenous water rights policies have in the past been vulnerable to political uncertainty. Such an entitlement could be included in the *Native Title Act*, taking precedent from the statutory native title rights to water under section 211 of the *Native Title Act*. However, given that a native titleholder cannot rely on the protection of statutory water use rights under section 211 for anything more than that which is recognised as part of a native title determination under section 223, providing for commercial indigenous water rights outside of the *Native Title Act* would minimise the risk of the rights being read down by association. The rights could be provided for in water legislation, like Aboriginal ‘access licences’ in New South Wales,²¹⁵ or in a standalone indigenous water rights statute.

What should be the nature and incidents of a commercial indigenous water right, if it is to be prescribed by legislation? In the legal pluralism literature, state laws that provide for indigenous rights are sometimes accused of translating and transforming indigenous interests and failing to account for the continually changing state of indigenous law.²¹⁶ Accordingly, preference should be given to mechanisms that allocate a ‘broad interest’ to indigenous-specific landholders, but avoid overly prescribing the content of the right or its conditions.²¹⁷ This could be done by providing a legislative indigenous water access entitlement for indigenous landholders, but otherwise leaving as much of the internal administration of the right as practicable with the landholders themselves.²¹⁸ Boelens et al describe the approach as ‘establishing the necessary conditions under the law (access to water and autonomy for management), in order to stay out of the way of

²¹⁴ [1971] 17 FLR 141. See Tehan, above n 83, 529.

²¹⁵ See above n 40 and accompanying text.

²¹⁶ See, eg, Rutgerd Boelens, ‘The Politics of Disciplining Water Rights’ (2009) 40 *Development and Change* 307, 316–17, 320; Benjamin R Smith and Frances Morphy, ‘The Social Effects of Native Title: Recognition, Translation, Coexistence’ in Benjamin Richard Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (Australian National University E Press, 2007) 1, 7. See also Glen S Coulthard, ‘Subjects of Empire: Indigenous Peoples and the “Politics of Recognition” in Canada’ (2007) 6 *Contemporary Political Theory* 437, 439; Mick Dodson, ‘Mabo Lecture: Asserting Our Sovereignty’ in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010) 13, 14.

²¹⁷ Jeremy Webber, ‘Beyond Regret: Mabo’s Implications for Australian Constitutionalism’ in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 60, 84–6.

²¹⁸ See Daniel Fitzpatrick, ‘“Best Practice” Options for the Legal Recognition of Customary Tenure’ (2005) 36 *Development and Change* 449.

the law'.²¹⁹ Chilean law providing for indigenous water rights has attempted to do that, by providing indigenous landholders with a share of *derechos de aprovechamiento* in the market, but resisting the urge to further particularise the rights for indigenous right holders.²²⁰ This means that representatives of indigenous landholders would need to be involved in state water planning, something that is called for in the National Water Initiative,²²¹ and has already been implemented to a degree in some states and territories.²²²

The design of a statutory allocation model is not a simple process of legislating an entitlement and must involve a 'longer process of interaction, mutual adaptation and incitement to reflection and reform'.²²³ However, to address the historical and ongoing inequity, by which indigenous people have been excluded from water law frameworks, any legislation providing for commercial indigenous water rights should satisfy certain criteria. The indigenous water rights should have the same broad characteristics as the 'water access entitlements' held by other right holders²²⁴ as: 'a perpetual or open-ended share of the *consumptive pool* of a specified water resource, as determined by the relevant *water plan*'.²²⁵ The 'indigenous water access entitlement' would take from the consumptive pool and be exercisable for private benefit consumptive purposes including irrigation, industry, urban and stock and domestic use.²²⁶ The quantum of water allocated to an indigenous water access entitlement in any particular area is something that requires further consideration, together with indigenous landholders and state water planners. O'Donnell has suggested that the quantum be determined with reference to a number of factors, including indigenous landholding and indigenous disadvantage.²²⁷ Unlike the New South Wales 'commercial access licences', the indigenous water access entitlement would need to be large enough to support commercial activities on indigenous lands.

If it were to have the same characteristics as the water access entitlements held by other right holders, an indigenous water access entitlement must be 'exclusive', 'able to be

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- ²¹⁹ Rutgerd Boelens et al, 'Special Law: Recognition and Denial of Diversity in Andean Water Control' in Dik Roth, Rutgerd Boelens and Margreet Zwarteveen (eds), *Liquid Relations: Contested Water Rights and Legal Complexity* (Rutgers University Press, 2005) 144, 167. See also Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving Away from "Fitting in" to Creating a Decolonized Space' (2013) 18 *Review of Constitutional Studies* 19, 47, who argue (in the context of allowing a sphere for indigenous autonomy and authority as part of decolonisation), '[t]he decolonization strategy is to create a space for Indigenous governance to continue to "breathe"'.
²²⁰ Although where *derechos de aprovechamiento* are acquired with finance from the Indigenous Land and Water Fund they are subject to a 25 year restriction on their alienation.
²²¹ Council of Australian Governments, 'National Water Initiative', above n 3, [52(i)].
²²² National Water Commission, 'Indigenous Involvement in Water Planning', above n 41.
²²³ Webber, above n 218, 70.
²²⁴ This is reflected in demands by the North Australian Indigenous Land and Sea Management Alliance ('NAILSMA') for 'a water access entitlement from the consumptive pool with the same reliability as high-reliability irrigation rights': NAILSMA Indigenous Water Policy Group, 'Indigenous People's Right to the Commercial Use and Management of Water on Their Traditional Territories' (Policy Paper, North Australian Land and Sea Management Alliance, June 2012) 11 <<http://www.nailsma.org.au>>.
²²⁵ Council of Australian Governments, 'National Water Initiative', above n 3, [28] (emphasis in original).
²²⁶ Ibid sch B(i).
²²⁷ See O'Donnell, 'Indigenous Rights', above n 13, 19.

traded, given, bequeathed or leased’, ‘able to be subdivided or amalgamated’, ‘be mortgageable (and in this respect have similar status as freehold land when used as collateral for accessing finance), ‘be enforceable and enforced’, and ‘be recorded in publicly-accessible reliable water registers that foster public confidence and state unambiguously who owns the entitlement, and the nature of any encumbrances on it’.²²⁸ An indigenous water access entitlement, therefore, would have many of the characteristics of indigenous water rights in Chile, which, in Chile’s civil law context, have the status of ownership (*propiedad*). Yet, whether indigenous rights to land and resources should be transferable is controversial, and legal mechanisms that recognise indigenous rights to land and resources often place limits on the alienability of such rights.²²⁹ Native title rights to water, for example, are inalienable and cannot be transferred, leased or mortgaged.²³⁰ Restrictions on alienation are sometimes justified on the basis that permanent alienation of property rights is not possible in traditional indigenous culture.²³¹ They are also considered necessary to maintain indigenous control of rights to land and resources for the economic and cultural benefit of future generations.²³² However, restrictions on alienation are often criticised for their dampening effect on indigenous development, particularly by preventing the raising of finance.²³³ The recent ‘White Paper on Developing Northern Australia’, for example, provides that ‘Indigenous Australians should be able to use their exclusive native title to attract capital necessary for economic development’.²³⁴

In Chile, *derechos de aprovechamiento* acquired with finance from the Indigenous Land and Water Fund are ‘inalienable’ for 25 years without administrative consent (including by transfer of ownership, embargo, tax, prescription or lease), although the restriction may be lifted if the finance is repaid. The stated purpose of the restriction was to maintain resources in indigenous ownership for future economic development, while also supporting government return on investment. The 25-year restriction on alienation of indigenous water rights acquired with finance from Chile’s Indigenous Land and Water Fund provoked prolonged debate in the Parliament with some representatives arguing that such a ‘market limitation’ would only reduce the resource’s value.²³⁵ As a compromise, the Chilean Parliament agreed to allow transfers of indigenous land and water rights ‘within the same indigenous ethnicity’.²³⁶ Senator Navarrete described the mechanism, as it applied to land, as creating an ‘indigenous

²²⁸ Council of Australian Governments, ‘National Water Initiative’, above n 3, [31].

²²⁹ See, eg, Tyron J Venn, ‘Economic Implications of Inalienable and Communal Native Title: The Case of Wik Forestry in Australia’ (2007) 64 *Ecological Economics* 131.

²³⁰ *Mabo [No 2]* (1992) 175 CLR 1, 59 (Brennan J).

²³¹ See *ibid.*

²³² See, eg, *Te Ture Whenua Maori Act 1993* (NZ), which includes various restrictions on alienation of different types of Maori estates, and in the preamble provides ‘land is a taonga tuku iho [treasure] of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau [family], and their hapu [subtribe]’.

²³³ See, eg, Joshua Hitchcock, ‘Financing Maori Land Development: The Difficulties Faced by Owners of Maori Land in Accessing Finance for Development and a Framework for the Solution’ (2008) 14 *Auckland University Law Review* 217.

²³⁴ Australian Government, above n 211, 25.

²³⁵ Camera de Diputados [House of Representatives], above n 192, 143.

²³⁶ *Indigenous Law* art 13.

land market', whereby properties could be commercialised, alienated or transferred within indigenous communities.²³⁷

Whether the alienation of indigenous water rights should be restricted in Australia is also controversial, and is a matter for further (indigenous-led) research and consultation, although policy designers are experimenting with novel approaches and compromises. For example, restrictions on alienability have been relaxed to an extent under the *Water Management Act 2000* (NSW), with Aboriginal access licences being transferable amongst Aboriginal people.²³⁸ The North Australian Indigenous Land and Sea Management Alliance has proposed that indigenous water rights be exclusive and able to be temporarily traded, subdivided or amalgamated, mortgageable, enforceable and registered.²³⁹ Either way, alienability may not be a necessary precondition for the use of water for commercial purposes, or a prerequisite for future indigenous economic development more generally. Indigenous landholders may still exercise water use rights for commercial purposes as contemplated here (rather than trade in the rights themselves) if the rights are inalienable. The potential for transfer of an indigenous water access entitlement within or between indigenous groups, or leasing of an indigenous water access entitlement to other water users, suggests future potential revenue streams for indigenous landholders.

3 *An Indigenous Water Holder*

An important lesson from the study of Chilean laws providing for indigenous water rights in this article is that, in the case of fully allocated water resources, indigenous water rights cannot be provided for without some form of redistribution. Any law providing indigenous landholders with a water access entitlement must confront the fact that in many parts of Australia, particularly the Murray Darling Basin, water resources are already fully allocated. The Indigenous Land and Water Fund sought to balance indigenous and non-indigenous historical rights in water as a 'fair solution';²⁴⁰ facilitating redistribution in a way that did not impact adversely on other right holders, because water use rights would be voluntarily acquired in water markets.

Funding mechanisms have been used in Australia in the past to redistribute rights in the land market. For example, the Aboriginal Land Fund was established to work alongside indigenous land rights legislation to 'assist Aboriginal Communities to acquire Land outside Aboriginal Reserves'²⁴¹ and operated from 1975–1980.²⁴² In 1995, as part of

²³⁷ Senado [Senate], 'Discusión en Sala: Legislatura 326, Sesión 11. Fecha 14 de Julio, 1993' [Parliamentary Debates: Legislature 326, Session 11. Date 14 July 1993] (30 June 1993) in Biblioteca del Congreso Nacional de Chile (ed), 'Historia de la Ley No 19.253: Establece Normas sobre Protección, Fomento y Desarrollo de los Indígenas y Crea la Corporación Nacional de Desarrollo Indígena' [History of Law No 19.253 to Establish Norms for the Protection, Creation and Development of the Indigenous, and to Create the National Corporation of Indigenous Development] (Biblioteca del Congreso Nacional de Chile, 5 October 1993) 406, 417.

²³⁸ *Water Sharing Plan for the Tweed River Area Unregulated and Alluvial Water Sources 2010* (NSW) reg 38.

²³⁹ NAILSMA Indigenous Water Policy Group, above n 225, 11.

²⁴⁰ Solís and Luis, above n 50, 33.

²⁴¹ *Aboriginal Land Fund Act 1974* (Cth) s 1.

²⁴² *Ibid* s 16; *Aboriginal Development Commission Act 1980* (Cth) s 6.

reforms to the *Native Title Act* the Commonwealth set up the Indigenous Land Corporation, the former Prime Minister noting:

While these communities remain dispossessed of land, their economic marginalisation and their sense of injury continues. As a first step, we are establishing a land fund. It will enable indigenous people to acquire land and to manage and maintain it in a sustainable way in order to provide economic, social and cultural benefits for future generations. Addressing dispossession is essential but will not be enough to overcome the legacy of the past and achieve reconciliation.²⁴³

The Indigenous Land Corporation continues to ‘assist Indigenous peoples in Australia to acquire land and to manage Indigenous-held land ... to provide cultural, social, economic or environmental benefits for themselves and for future generations’.²⁴⁴ However, the Australian land funds did not, and do not, apply to water.

An Aboriginal Water Trust operated in New South Wales between 2000 and 2009 to provide specific purpose grant funding for water infrastructure and offering ‘opportunities to establish water based commercially viable enterprises for Aboriginal communities’.²⁴⁵ It did not, however, finance the acquisition of water use rights for Aboriginal groups in the market. Indigenous groups have started to lobby Australian governments for the establishment of an indigenous water fund to finance the purchase of water use rights.²⁴⁶ For example, the First Peoples’ Water Engagement Council, an indigenous representative advisory group established by the former National Water Commission, released an options paper recommending the establishment of an ‘Indigenous Economic Water Fund’ in April 2012,²⁴⁷ the key purpose of which was:

economic development as distinct from indigenous cultural and environmental water that should be set out in [the] planning process. The [Indigenous Economic Water Fund] is not an alternative to addressing access to cultural and customary water but an additional policy to improve the economic lives of indigenous people.²⁴⁸

The Council proposed that the Fund would be used to acquire water use rights for ‘indigenous people’ to support economic development, via a range of acquisition mechanisms including ‘government buyback’, ‘philanthropic buyback’, ‘self-funded buyback’ and ‘gift’.²⁴⁹

²⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2882 (Paul Keating, Prime Minister).

²⁴⁴ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, *Examination of Annual Reports for 2002–2003* (2004) 15 [3.2]. See also *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191B. The preamble to the *Native Title Act* notes the role this fund plays in assisting indigenous people to acquire land rights where native title claims cannot be made out because they ‘have been dispossessed of their traditional lands’.

²⁴⁵ New South Wales Office of Water, ‘Our Water Our Country: An Information Manual for Aboriginal People and Communities About the Water Reform Process’ (Edition 2.0, February 2012) 1.3 <<http://www.water.nsw.gov.au>>.

²⁴⁶ See, eg, North Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, above n 209, 3.

²⁴⁷ Lawlab, above n 208.

²⁴⁸ Ibid 6.

²⁴⁹ Ibid 13.

The study of Chile's Indigenous Land and Water Fund demonstrates the importance of setting aside a 'water reserve' in areas where water resources are not already allocated to third parties. The failure of the Chilean government to set aside a portion of water use rights for indigenous use in the future, prior to resources reaching full allocation, has undermined the effectiveness of the Fund, because water rights acquisitions at market prices are costly and the Fund receives limited governmental support. Many water resources in Australia are yet to be fully allocated to water use rights, particularly in the well-watered north. However, water markets encourage competition for water use rights, placing further strain on the availability of water use rights for attending to indigenous water demands in the future. For this reason some indigenous groups have started to agitate for commercial water rights outside of the native title process, as a 'pragmatic response' to the increased competition for water caused by unbundling and water markets.²⁵⁰ Some water reserves have already been set aside in Queensland and the Northern Territory, to help indigenous communities achieve economic and social aspirations. The former National Water Commission stressed the need for both a water fund and water reserve in 2012, recommending:

that in water systems that are fully allocated the creation of a fund to acquire appropriate water rights should be considered. In systems not fully allocated alternative approaches such as Strategic Indigenous Reserves could be set aside in water planning processes.²⁵¹

A statutory allocation model, comprising both a water fund and water reserve, has already been successfully implemented in Australia with respect to environmental water. The Commonwealth Environmental Water Holder was established by the *Water Act 2007* (Cth) to manage environmental water holdings in the Murray Darling Basin. As well as managing instream environmental water interests, the Commonwealth Environmental Water Holder has the capacity both to hold water use rights and purchase (and sell) water use rights in the market, in the interests of the environment.²⁵² The Commonwealth Environmental Water Holder is now the single largest holder of environmental water rights in Australia.²⁵³ Its portfolio of water use rights was acquired through a combination of government purchases and savings of water via investment in water supply infrastructure that reduced water losses and incentivised reduced water use.²⁵⁴ Significantly, the portfolio of water use rights acquired by the Commonwealth Environmental Water Holder was acquired without any need for widescale compulsory redistribution.

²⁵⁰ NAILSMA Indigenous Water Policy Group, above n 225, 9.

²⁵¹ National Water Commission, 'Indigenous Access to Water Resources' (Position Statement, 2012) 2
<<http://webarchive.nla.gov.au/gov/20160615060726/http://www.nwc.gov.au/nwi/position-statements/indigenous-access>>.

²⁵² *Water Act 2007* (Cth) ss 104–15. See generally E O'Donnell and E Macpherson, 'Challenges and Opportunities for Environmental Water Management in Chile: An Australian Perspective' (2013) 23 *Journal of Water Law* 24.

²⁵³ Erin O'Donnell, 'Institutional Reform in Environmental Water Management: The New Victorian Environmental Water Holder' (2011) 22(2/3) *Journal of Water Law* 73, 78.

²⁵⁴ Department of Sustainability, Environment, Water, Population and Communities, 'Water for the Future' (Fact Sheet, October 2010) <<http://www.environment.gov.au>>.

An indigenous water holder could even be provided for within the existing institutional framework for the Indigenous Land Corporation (which was specifically intended for situations where historical claims could not be established), expanded to reallocate water as well as land rights.²⁵⁵ However, further research is needed, with indigenous people, to consider the viability of an indigenous water holder in Australia and the detail for its implementation, which is beyond the scope of this article. Important questions remain about the quantum of water that should be allocated to an indigenous water access entitlement, and the extent to which such an entitlement can be transferred independent of land or permanently alienated. However, an indigenous water holder could play an instrumental role in responding to the unjust distribution of commercial water rights in Australia.

VI CONCLUSION

The literature on indigenous water rights often portrays the unbundling of water use rights from landholding, and the presence of water markets, as a threat to continued water access by indigenous groups leading to the accumulation of water use rights by third parties.²⁵⁶ It is undeniable that indigenous exclusion from water law frameworks intensified as a result of unbundling in Australia. However, indigenous Australians have been excluded from laws providing for water use rights as an incident of landholding since the acquisition of sovereignty. It was that historical exclusion that enabled other right holders to accumulate water use rights. Somewhat ironically, the unbundling of water use rights from land title and the emergence of water markets has also provided the basic conditions necessary for implementing a statutory allocation model.

When the Council of Australian Governments agreed to unbundle water use rights from landholding and introduce water trading in the early 1990s, the opportunity to allocate a share of water use rights to indigenous-specific landholders was not taken.²⁵⁷ The absence of debate about indigenous water rights in the early 1990s might be explained by preoccupation with the fledgling native title process, which at first showed great promise for the recognition of land and water rights.²⁵⁸ However, as discussed here, native title has failed to recognise rights to water for commercial purposes.

The Chilean experience is one example of a statutory allocation model being used to redistribute water use rights to indigenous landholders. Ritter argues in the Australian context that statutory indigenous land rights, when compared to native title, amount to

²⁵⁵ *Aboriginal and Torres Strait Islander Act 2005* (Cth) pt 4A.

²⁵⁶ See, eg, Rutgerd Boelens, Armando Guevara-Gil and Aldo Panfichi, 'Indigenous Water Rights in the Andes: Struggles over Resources and Legitimacy' (2010) 20 *Journal of Water Law* 268. Boelens, Guevara-Gil and Panfichi argue instead for 'grass-roots' approaches to water regulation which allow for the continuance of indigenous and peasant water use in common property regimes.

²⁵⁷ Council of Australian Governments, 'Communique', above n 27. This may be contrasted with proposals to introduce unbundling and water markets in New Zealand Aotearoa in which Maori seek an equitable share of the available allocable water quantity. See Kieran Murray, Marcus Sin and Sally Wyatt, 'The Costs and Benefits of an Allocation of Freshwater to Iwi' (Report for Iwi Advisors Group, Sapere Research Group, 6 December 2014) 10 <<http://www.iwichairs.maori.nz>>.

²⁵⁸ See generally Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths, 2009) 255, 257–66.

a ‘favour’ rather than a ‘right’.²⁵⁹ This characterisation may exaggerate the strength of the native title model, although it is a reminder that statutory mechanisms for indigenous rights depend on the political will of governments: a political vulnerability clear in the previous Northern Territory Government’s declaration that it will not include strategic indigenous reserves in future water plans,²⁶⁰ lack of development on the Indigenous Economic Water Fund since the options paper released in 2012, and inactivity of the First Peoples’ Water Engagement Council. Yet, for the reasons I have argued here, renewed attention must now be given to indigenous demands for commercial water rights. As a reassuring indication of future policy tendencies, Victoria’s new Water for Victoria plan includes a section on Aboriginal access to water for economic development, and recommends a combination of water savings, acquisitions and buy backs to enable water allocations to indigenous people without impacting the water rights of other users.²⁶¹

A statutory allocation model has already been implemented in Australia on more than one occasion. Indigenous land rights legislation, for example, arose out of the inability of the common law to recognise native title rights to land in Australia. In establishing the Environmental Water Holder, the Commonwealth Government committed considerable investment in buying-back water for the environment.²⁶² Ultimately, government investment in these statutory allocation models, as with the statutory allocation model for indigenous water rights in Chile, was warranted in the public interest.

²⁵⁹ David Ritter, *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights* (Allen & Unwin, 2009) 3.

²⁶⁰ National Water Commission, ‘A Review of Indigenous Involvement in Water Planning, 2013’ (April 2014) 26–7
 <<http://webarchive.nla.gov.au/gov/20160615062953/http://www.nwc.gov.au/publications/topic/water-planning/indigenous-involvement-in-water-planning>>; Stewart, above n 214.

²⁶¹ Water for Victoria, ‘Water Plan’ (Department of Environment, Land, Water and Planning (Vic), 2016) 106.

²⁶² O’Donnell, ‘Institutional Reform’, above n 254, 74.